IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

ePLUS, INC.	:	Civil Action No. 3:09CV620
vs.	:	
LAWSON SOFTWARE, INC.	:	December 30, 2010

COMPLETE TRANSCRIPT OF THE TELEPHONE CONFERENCE

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE

APPEARANCES:

Scott L. Robertson, Esquire
Michael G. Strapp, Esquire
Jennifer A. Albert, Esquire
David M. Young, Esquire
Goodwin Procter, LLP
901 New York Avenue NW
Suite 900
Washington, D.C. 20001

Craig T. Merritt, Esquire
Christian & Barton, LLP
909 East Main Street
Suite 1200
Richmond, Virginia 23219-3095
Counsel for the plaintiff

Peppy Peterson, RPR
Official Court Reporter
United States District Court

APPEARANCES: (cont'g)

Dabney J. Carr, IV, Esquire
Troutman Sanders, LLP
Troutman Sanders Building
1001 Haxall Point
Richmond, Virginia 23219

Daniel W. McDonald, Esquire
Kirstin L. Stoll-DeBell, Esquire
William D. Schultz, Esquire
Merchant & Gould, PC
80 South Eighth Street
Suite 3200
Minneapolis, Minnesota 55402

P R O C E E D I N G S

THE COURT: Hello.

MR. MERRITT: Good afternoon, Judge.

THE COURT: Hello. This is ePlus against Lawson, and identify yourselves for the record and who you represent, please, and remember to give your name when you speak.

MR. MERRITT: Judge, for ePlus, this is Craig Merritt, and my colleagues from Goodwin Procter can identify themselves.

MR. ROBERTSON: Good afternoon, Your Honor. This is Scott Robertson. With me on the phone here in Richmond are my partners Michael Strapp and Jennifer Albert.

MR. YOUNG: And David Young of Goodwin Procter calling in from Washington, D.C.

MR. CARR: Judge, this is Dabney Carr, and my colleagues from Merchant and Gould can identify themselves.

MR. McDONALD: Good afternoon, Your Honor. Dan McDonald and Will Schultz are calling in for Lawson.

MS. STOLL-DeBELL: And, Your Honor, Kirstin Stoll-DeBell for Lawson is also on the phone.

THE COURT: If I had realized you were all in Richmond, you could have come over here and done this.

MR. McDONALD: We're dodging in between the snowstorms. I think we'll make it, but we're not there yet.

THE COURT: Well, if you get to Richmond, it will be 60 degrees over the New Year holiday.

MR. McDONALD: Let me rebook my ticket immediately.

THE COURT: All right, I have a motion to sequester witnesses which was just filed on the 22nd of December, or was filed on the 22nd. I don't have any response. Do we have a response?

MR. CARR: Judge, this is Dabney Carr. I filed a response this morning, and I believe a reply was filed just about an hour or so ago.

THE COURT: Oh, yes, I see. I do have the response here. I haven't read the reply. Let's see. All right. Do you all want to argue that as well? I've just read the response. I don't know what the reply says.

MR. ROBERTSON: Judge, this is Mr. Robertson. We obviously, given the fact that we're going to start the trial in a matter of days, on Tuesday, so I think it's important to address. I would -- you know, I would like to give the Court the opportunity to read the briefing.

Mr. Merritt is prepared to address the issues. I think it's closely tied to our motion to enforce the Court's orders with respect to certain moving-target expert opinions we've been dealing with.

THE COURT: Okay. Well, here's what I want to tell you: This supplemental expert -- experts don't have a right to

reserve opinions and change their opinions, because the whole process, the reason that the rules were changed to require experts to do what they were supposed to do under Rule 26 is to pin them down and not have changing opinions so that people have to deal with them as they evolve.

That was the game that was being played up to and including trial before the amendments to the rule in -- what was it -- 1993, I believe these came in. And these experts that say, I reserve the right, they don't have any more right than the man in the moon to do that, and they're not allowed to do it.

So they go with the original reports. That's all they can go with, and the ones on which they were deposed, and you can't just keep changing reports. I don't care which side is doing that. You can't do it.

Now, we've made provisions, I believe, in this case for rebuttal reports, and those rebuttal reports are intended to rebut what was in the opposing party's response expert reports. So those are the only reports that are allowed, and I understand this whole concept of supplementation, but you can't use supplementation as a vehicle to get around the concept of the rules. So maybe that will help you all in preparing for trial.

I will read the papers. I've read the response. Give me a minute and I'll read the reply. It's not very long.

And I'll hear your argument, Mr. Merritt, if you all are prepared to argue.

MR. MERRITT: Your Honor, I'd be happy to. Would you like me to take a moment so you can continue looking at the reply?

THE COURT: Yes, and I'll have to ask Mr. McDonald if he's ready to address it, too.

MR. McDONALD: I believe -- Kirstin, were you going to handle this one?

MS. STOLL-DeBELL: Sure.

MR. McDONALD: Okay. Actually, Your Honor, I'll go ahead and handle that motion anyway. We're ready. This is Dan McDonald for Lawson.

THE COURT: All right. Well, I'm still reading. All right, I've read the reply brief as well as the response brief.

MR. MERRITT: Judge Payne, this is Craig Merritt on behalf of ePlus. It's a fairly straightforward request, we believe. I know the Court is well familiar with Rule 615 of Federal Rules of Evidence.

Under Fourth Circuit law, and you have the case we provided to you in our opening brief, the *Opus 3* case, there is a presumption in favor of sequestration when it is requested by a party. It is subject to the exceptions that are set out in the rule.

We understand that Lawson is trying to proceed under

exception number three which is a person whose presence is shown by Lawson to be essential to the presentation of Lawson's cause. Your ruling, under Fourth Circuit law, is discretionary on this, but we believe that there are very good reasons in the context of this particular case to exercise that discretion to keep the experts out.

The *Opus 3* case is pretty clear and pretty helpful in pointing out that the expert in that case, although he was, in fact, a fact witness as well and had the opportunity to look at the parties' records, to look at all of the matters on which he is going to testify, all the relevant records and analyze them, that he had prepared his own written analysis prior to trial. Everything had been disclosed to him.

He had disclosed everything he needed to disclose, and under those circumstances, the defendant who was trying to keep him in the courtroom simply couldn't meet its burden, and it is the defendant's burden, or the person who is opposing the sequestration, to show why that person is essential.

It's clear from this case, as well as from the Pennsylvania case that we cited in our reply brief, that essential means essential. It doesn't mean preferable or something someone would like to do.

I don't think it's any secret that this motion is aimed primarily at Dr. Shamos. We have filed a number of motions during the course of the litigation expressing our

concern from the start that he was something of an all-purpose expert who seemed to be able to move in a very easily malleable fashion from one opinion to another and has said in his own report, notwithstanding what I understand you've just told us, that he reserves the right to sit in the courtroom and generate opinions on the fly. We would just like to avoid that potential by simply having him and all the other experts excluded.

THE COURT: Mr. McDonald?

MR. McDONALD: Your Honor, I think there's two main reasons why, in addition to the case law, of course, which very rarely excludes experts, and I don't think any cases were cited that involved a patent case.

Allowing our expert, Dr. Shamos, to be there and, of course, then ePlus's experts can be there as well, that is not inconsistent with anything relating to limiting them to what's in their reports, and the reason for that is the fundamental distinction that has been addressed and utilized a number of times throughout this case.

The difference between having opinions that are fixed based on theories that are fixed versus having what specific pieces of evidence that would support that theory, or support that opinion, and in an expert report, it's kind of by definition they are relying on assumptions, in effect, of what the evidence will come in as.

Those are facts, factual assumptions, whereas at trial, they can rely on the actual evidence as presented that would correspond to those assumptions and not deviate from those assumptions. We are not seeking the chance to make this a notice of facts, but it would be confusing for the jury to have an expert come in and just say, well, I'm assuming some facts, and testify in a way that would not bear relation to the actual fact witnesses as they have testified in the case.

THE COURT: Wait a minute. You said not make it an ozone of facts. What are you talking about?

MR. McDONALD: I didn't use the word ozone. I'm trying to remember what phrase I did use there, but the same operative facts that he relied on for purposes of his report as an assumption, the exact same facts as they come into evidence. He can refer to the witness Smith or Jones or whoever and say, that witness testified as to that fact and that's the basis for that opinion.

The effect is the same. It just changes from an assumption at the point of his report to actual evidence as presented at trial when he testifies. That's number one.

Then number two is, the other aspect of allowing the expert there is to assist us in trial during trial before the expert testifies. He's very knowledgeable in this technology field, and he will be assisting us during trial if he's able to attend the trial and hear the other witnesses as they go along.

That's another reason why we think it's very fair and why the rules in the case law that you see certainly contemplate that experts are regularly and routinely allowed to attend the rest of the trial and are not sequestered.

THE COURT: All right. Anything else, Mr. Merritt?

MR. MERRITT: Your Honor, I'll simply respond to those two points in reverse. One thing this case doesn't lack is very capable, experienced lawyers, and I certainly believe that Mr. McDonald and Mr. Carr can try their case very effectively without Dr. Shamos at their shoulder.

In response to his first point, it strikes me that if an expert has been out of the courtroom and is brought in to testify, that it's the lawyer's job to make sure that questions are asked based on the evidence that's in the record and that the jury has either heard or they reasonably expect the jury to hear, and I'm not concerned about confusion about that as long as the lawyers do their jobs.

MR. ROBERTSON: Your Honor, this is Mr. Robertson. If you'll permit me an indulgence, I don't want to step in here given that Mr. Merritt's argument, I think, was cogently made, but I do want to make one point if you'd allow me.

THE COURT: Go ahead.

MR. ROBERTSON: Dr. Shamos has had unfettered access to any Lawson employee he wanted to talk to to understand the operations and the functionality of the system for purposes of

his opinions. Dr. Shamos has had unfettered access to any of the witnesses concerning invalidity since they are all consultants of Lawson.

So the arguments that somehow he needs to hear the testimony now new and afresh only suggests to me exactly Your Honor's concern which was that these opinions are going to shift from day to day, and we'll be hearing them for the first time during the trial.

If an expert can do that, then there's no reason for Rule 26 disclosures anymore such that the opinions are disclosed and the reasons and bases therefor are set forth so we can do it in an orderly and proper fashion, and that's what we have here.

Now, this is a situation that cuts both ways. My experts are not going to sit in on any of the trial as well, and they will be testifying based on the evidence that was disclosed in their reports. So we think it's only fair that we don't have these moving targets going forward, and as Mr. Merritt said, particularly in this case which I think we're going to get to in a few moments in our motion to enforce the Court's orders. Thank you.

MR. McDONALD: Your Honor, this is Dan McDonald. May I respond to those points?

THE COURT: Sure.

MR. McDONALD: On the unfettered access issue, there

is a key piece of prior art. It's the RIMS system that is the prior Fisher Scientific system that we certainly have not had unfettered access to the witnesses. Those are the listed inventors on the patents-in-suit that also have knowledge of that system that are the paid consultants of ePlus, and so Dr. Shamos certainly has not had unfettered access to those people.

And this idea that the trial can somehow run amok, I think, is belied by the fact that Mr. Robertson and his team tried the *SAP* case with these exact same patents with an order from the Court that allowed the experts to attend the trial, and they were not sequestered from the case, and yet that case was able to be tried just fine.

MR. ROBERTSON: Two points in response to that, Your Honor. This is Mr. Robertson again. I tried the *Ariba* case, and Judge Brinkema excluded all the experts from that case. That was involving the same patents-in-suit. I've tried many patent cases where the experts have been excluded.

Secondly, Mr. McDonald deposed all three of the inventors, and I'm certain, because it's cited in Dr. Shamos's report, that he reviewed those depositions of those experts. So there should be no surprise there as well.

THE COURT: Mr. Robertson, what kind of telephone are you working from?

MR. ROBERTSON: Working from a speakerphone, Your Honor, so I apologize. I hear there's some echo involved; is

that right?

THE COURT: There is an echo and a fading, so maybe you can get off the speakerphone.

MR. ROBERTSON: Your Honor, I'll try and dial in to the call on my cell phone. I apologize.

THE COURT: You're not any better now than you were when you were on the speakerphone.

MR. ROBERTSON: I'm in the midst of dialing, Your Honor. It's going to take me a minute. I apologize.

MR. MERRITT: Do we still have a connection?

THE COURT: I don't know.

MR. ROBERTSON: Your Honor, can you hear me?

MR. MERRITT: You have to turn the other phone off. You're getting an echo.

MR. ROBERTSON: Your Honor, I'm sorry. Can you hear me now?

THE COURT: I can.

MR. ROBERTSON: I feel like that Verizon commercial, but I guess let me refute the two points I tried to make, and that was, one, Mr. McDonald has deposed all the inventors, and so there should be no surprise there, and Dr. Shamos has reviewed and read the inventor depositions.

THE COURT: All right.

MR. ROBERTSON: Number two, I've been a party to many a case where the experts have been excluded including cases

involving these patents in front of Judge Brinkema. So to the extent that Judge Spencer made his discretionary decision in that case, we respectfully lived with it, but in this case, we think it's particularly inappropriate because we believe that Dr. Shamos should not be able to shape his opinions that he's already given based on testimony he now says he's heard for the first time and that we'd be hearing for the first time at trial.

THE COURT: All right. Thank you. In the Fourth Circuit, the controlling case is still *Opus 3, Limited, against Heritage Park, Inc.*, and there the Fourth Circuit held that because of its important role in reaching the truth, Rule 615 carries a presumption favoring sequestration citing its decision in *United States against Farnham*, and, therefore, the Court held, that the rule's exemptions, of which there are several, are to be construed narrowly in favor of the party requesting sequestration, and for the same reason, the parties seeking to avoid sequestration of a witness bears the burden of proving that a Rule 615 exemption applies.

The exception involved here is the one in Federal Rule of Evidence 615(3) which says that the rule does not authorize exclusion of a person whose presence is shown by a party to be essential to the presentation of the party's cause. That burden must be carried by Lawson in this case.

In reviewing the information that's been provided, I

do not see that Lawson has carried that burden. It has not shown that Dr. Shamos or any other expert is essential to the presentation of its cause. The experts have had reports, opening reports, rebuttal reports, and they've had access to an enormous quantity of information, have formed their opinions, and I believe that there's been ample time here to prepare this case for trial even after the final pretrial conference, and so I don't find that the burden has been met here.

Further, I will say that I am inclined to believe that I have been confronted in this case with the most difficult of circumstances, which is the shifting of opinions already, and the shifting of theories, and I don't want any more of it.

I'm going to have, I see, difficulty at trial anyway in making -- in policing the experts staying to their opinions because the opinions are so long, and we've already had a number of instances where there have been problems along those lines.

So considering all of those factors, the Court exercises its discretion and grants plaintiff's ePlus, Inc.'s request to sequester witnesses pursuant to Federal Rule of Evidence 615.

The next issue to be dealt with is the proposed -- the motion, excuse me, of ePlus. It's entitled, plaintiff ePlus, Inc.'s motion to enforce prior court orders. I've read

the briefing on all of that. I am -- again, I want to remind counsel that I don't know what the experts are doing about changing opinions, but neither side is going to be able to do that, and I'll expect you to be able, at trial, if an expert is offering an opinion, to be able to point precisely where in an expert's report that same opinion appears, because if it is not there, it isn't coming in.

That's been the rule around here for a long time, and it is the rule under the evidence, and it is the necessary rule to enforce the purpose of the 1993 amendments calling for the Rule 26(e) disclosure reports that are specified in the rule.

All right, plaintiff's, ePlus's motion to enforce prior court orders -- well, it's kind of troublesome to me that I have to be even entertaining a motion like this. I expect the orders to be adhered to, and I don't understand why we're at this point in this case, but there are several different issues raised here, and --

MR. ROBERTSON: Yes, sir. Maybe I can try to provide some structure to the issues that are raised here because you are correct, there are probably at least five separate topics involving the Court's prior orders.

If I might maybe highlight what those five topics are and then address them in order, that might work unless the Court has any specific questions from the outset, but, yes, we are troubled as well, Your Honor, by what we sense is a

repeated effort to circumvent the Court's most explicit orders with respect to any of these witnesses, and I think Your Honor characterized it well when it said we shouldn't have experts testifying as to things they haven't disclosed in their reports.

Part of the problem we're having now is we're having fact witnesses that are being identified at this late date who are now purporting to act as experts, provide opinions, and introduce evidence that was never disclosed to us, even to this very day, one business day away from trial, and was not presented to the Court during the final pretrial --

THE COURT: Let's put some structure to this. The first issue is Mr. -- is it pronounced Hvass?

MR. ROBERTSON: I think it's pronounced Hvass.

THE COURT: Mr. Hvass's proposed testimony about a demonstration.

MR. ROBERTSON: Yes, sir.

THE COURT: As I understand the arguments, Mr. Hvass was not disclosed in the Rule 26(a) or (e) disclosures, that is he was not disclosed as a witness who had knowledge of discoverable information under (a) or an expert under (e) of 26.

He did not issue a report under 26. He is testifying, according to ePlus, to expert reports, expert issues nonetheless. He was deposed, but he was deposed as a

30(b)(6) witness and not on the topic of this demonstration. The demonstration has never been disclosed as of this, the time of the briefs. Those are the basic points that you are making; is that right, Mr. Robertson?

MR. ROBERTSON: That's exactly right, Your Honor.

THE COURT: And Mr. McDonald --

MR. ROBERTSON: As of today, we haven't seen whatever demonstration that Mr. Hvass is going to disclose. He was a 30(b)(6) witness as Your Honor notes correctly, but it was on the now-excluded Legacy system. He demoed that. That's what he was presented for, and nothing else, and it's been represented that he's going to be offering rebuttal opinions to the demonstrations of Dr. Weaver which we fully disclosed seven months ago, which we provided to the defendant, which we permitted them to depose Dr. Weaver on over two days, and which they've now had for what? Some seven months.

And so we find ourselves in a situation where one business day out from trial, they're going to be putting on some demonstrations, and their representation is that, well, they put on their exhibit list a laptop that said that they could demo the system, but they've never told us what it is. So we're going to be seeing it as you will, Judge, for the first time at trial. We just think that's unfair, improper --

THE COURT: Are you saying the demonstration is listed as an undisclosed exhibit?

MR. ROBERTSON: Absolutely, Your Honor. We've never seen it. We don't even know what it is.

In contrast, they've had our demonstrations for seven months and took depositions on them.

THE COURT: All right. And, Mr. McDonald, your theory is that, A, Mr. Hvass is a fact witness, not an expert witness, and that you don't dispute that he was not disclosed in a 26(a) or (e) disclosure, but you say he was deposed, and you say the functionality to which he is going to testify has been described in documents that have been provided by your side in the case. And then you say there was a waiver of any objection because the plaintiff did not object when Mr. Hvass was listed as a witness in your pretrial order. Those are the arguments you make; is that right?

MR. SCHULTZ: Your Honor, this is Will Schultz. I'll be responding to this particular issue.

THE COURT: All right, Mr. Schultz.

MR. SCHULTZ: Your Honor, that is correct. Those are our points. I would like to respond to some of the points that Mr. Robertson made.

THE COURT: That's fine.

MR. SCHULTZ: First of all, with respect to the demonstration, what is really happening here is that Mr. Hvass is a fact witness who will show the operation of a physical exhibit, and that is going through what the actual physical

exhibit is, and that is DX-335, which is Lawson's demonstration system, as well as PX-402 which is the Lawson demonstration system that has been altered by ePlus.

THE COURT: Mr. Schultz, they say that the demonstration -- what do you call it, DX what?

MR. SCHULTZ: DX-335, so Defendant's Exhibit 335.

THE COURT: And that's never been disclosed to them.

MR. SCHULTZ: It has been disclosed to them. It has been on our witness list --

THE COURT: No, no, no --

MR. SCHULTZ: I provided a copy to ePlus in the form of PX-402 which they have modified. DX-335 is an actual laptop computer.

THE COURT: Are you saying that DX-335 is the same as PX-402?

MR. SCHULTZ: It was originally; however, ePlus has modified their version of what we have as 335 to include additional documents and data uploaded including data that was never provided to us in discovery.

THE COURT: You haven't made any complaints about that, so I don't need to hear that, but what I'd like --

MR. SCHULTZ: (Inaudible) in our motion --

THE COURT: I don't care what was in your motion. I said you haven't objected to it. It wasn't in your motion, it was in your response brief, so I'm not dealing with that issue

now. I'm dealing with the issue that's on the table in the motions.

MR. SCHULTZ: Your Honor, that issue does go to the prejudice that would be afforded --

THE COURT: Mr. Schultz, you raise issues by presenting them in motions if you've got some complaint about it. Now, to the extent it's an argument on the prejudice -- the fact aspect of it is argument on the prejudice, I understand that point, but I want to -- wait a minute.

Mr. Robertson, is it correct that sometime ago, months ago in discovery, you got DX-335, and then you took it and converted it to PX-402? That's what he said. Is that true or not?

MR. ROBERTSON: What's accurate, Your Honor, and excuse me if I'm not precise on these exhibits, but what's accurate is, we asked for in discovery a demonstration system of the Lawson accused software. It was provided on a laptop.

The problem we had was that it did not have sufficient data on it. As Your Honor notes now from this case, you need to search for multiple items and be able to choose among the multiple vendors that provide the items.

THE COURT: Don't give too much information. Just go on with the point. It didn't have what you needed.

MR. ROBERTSON: It didn't have what we needed, so we asked Lawson over a series of months to assist us. We finally

got one of their consultants to help us load the data to be able to demonstrate the functionality, and once we did, we gave that laptop back to them months ago with that fully loaded data on it.

About a month ago, we learned for the first time that they wanted to now do some sort of demonstration and wanted our assistance which we said we'd provide, but it's your laptop, it's got the data on it, it's back in your possession. We never heard back from them until just recently that now they were going to do a full demonstration which, as I said in the beginning, has never been provided to us.

There is nothing that prevented them from, in response to Dr. Weaver's demonstrations provided back in May of 2010, from having Dr. Shamos do his own demonstrations illustrating whatever points they wanted to make in rebuttal and providing that to us so we could have dealt with it in an orderly fashion under the Court's scheduling order, but here we are, as I say, one business day out from trial, and I haven't seen this demonstration they want to put on to this day although they've had that laptop for several months with the data for the item information that we loaded to be able to demonstrate its capabilities. In fact, they had it at Dr. Weaver's deposition in July of 2010.

MR. SCHULTZ: Your Honor, if I could respond to that. It is my understanding that we were not provided the -- if Mr.

Robertson is referring to the version that they uploaded additional information to, we were not provided the actual laptop computer back. We were provided some of the information that was uploaded onto the computer.

We thereafter requested that they provide all of the information. We have now received all of the information, but the point here is that this is a physical exhibit.

THE COURT: You mean they gave you -- you all are obfuscating. Is the demonstration of the same -- is it going to be the running of the laptop that was given in DX-335?

MR. SCHULTZ: Yes, Your Honor.

THE COURT: And that's all that Hvass is going to do, is turn on the computer?

MR. SCHULTZ: What Mr. Hvass will do is turn on the computer and show the operation of the --

THE COURT: What does that mean, Mr. Schultz? Listen, folks, I'm going to tell you, I kind of need to have you to be accurate and avoid any misstatements here. What does it mean -- there's a difference between turning on a computer and letting it run and turning on a computer and operating it. That's what I'm asking you. What is he going to do; just turn on the computer and let it run in the form it was disclosed, or is he going to turn it on and actually sit there and try to operate it?

MR. SCHULTZ: This is Mr. Schultz. What he will be

doing is turning on the computer, and I don't know how specific you want me to get, but there's actually --

THE COURT: I don't want you to get too much information. I want to get right down to the bottom line. Is he going to be actually operating the computer, or is he turning it on and letting it do its thing?

MR. SCHULTZ: Turning on the computer and then clicking on the software that is on the computer to show the operation of the system.

THE COURT: And have you given the other side a presage of what it is that he's going to do?

MR. SCHULTZ: We've given them the laptop computer, nothing more.

THE COURT: The answer to that question then is no. Do you want to try that on for size? Is that correct? I'm going to take it as no unless you tell me otherwise. Is it no?

MR. SCHULTZ: It's no.

THE COURT: All right. That's how we answer questions, Mr. Schultz. Don't be obfuscating things here. All right. So, Mr. Robertson, you had this thing. Couldn't you just -- did they tell you how to operate it?

MR. ROBERTSON: Well, we had sufficient information --

THE COURT: Don't you obfuscate either. I'm talking to both of you.

MR. ROBERTSON: Your Honor, we did, through trial and error, learn how to operate it. It was not an easy exercise, and as I said, we had to load data on it to be able to show its functionality. The problem is, we have no idea, as Your Honor just elucidated, as to what they want to do with it.

I don't know if it's been modified since we provided it to them. I don't know anything about it, and I have no idea what Mr. Hvass wants to do. What they've told us is Mr. Hvass is going to do this to contradict or to undermine Dr. Weaver's opinions.

THE COURT: Mr. Schultz, is that the purpose of what Mr. Hvass is going to do, is to contradict the opinions of Dr. Weaver?

MR. SCHULTZ: No, Your Honor. What Mr. Hvass is intending to do is to provide an accurate depiction to the jury of what the Lawson demonstration system is. His testimony is to show that this 402, PX-402 is not the accurate demonstration laptop that is provided to customers.

It's that basic and that straightforward, and to answer your question of Mr. Robertson in a straightforward way, yes, Lawson provided instruction tutorial on how to operate the demonstration system several times. Mr. Keith Lohkamp was the person who did that, and I was on the phone when that occurred.

MR. ROBERTSON: Your Honor, let me just read from their brief. It says, Mr. Hvass --

THE COURT: Where are you reading from?

MR. ROBERTSON: Sir, I'm reading from the opposition.

THE COURT: What page?

MR. ROBERTSON: At page six, first full paragraph. Mr. Hvass will also provide fact testimony about how Dr. Weaver's demonstration of the accused system is not representative of the accused system provided by Lawson to customers and not how Lawson demonstrates the accused systems to customers. That's exactly verbatim from page six of the brief, directly contradicts the representation just made by Mr. Schultz to you.

So he's obviously being called in rebuttal to Dr. Weaver. We haven't seen these demonstrations. They've had these demonstrations that we did with their own laptop for seven months. This is just unfair surprise at not even the 11th hour. We're now at the 13th hour, Your Honor, and we just think that if this was going to be raised, it could have been raised early on because there was no surprise to them. We should have been dealing with this at the pretrial conference three months ago back in September, Your Honor.

THE COURT: All right, Mr. Schultz --

MR. ROBERTSON: We would respectfully request -- thank you.

THE COURT: Mr. Schultz, do you have anything else to say? I cut you off and went over to Mr. Robertson to get a

position, and I don't know whether you had anything else -- get a position while it was fresh in my mind, and I don't know whether you have anything else you'd like to add or not. Go right ahead if you do.

MR. SCHULTZ: Just, Your Honor, with respect to Dr. Weaver's demo, that is PX-402, and if there's any confusion, that's what Mr. Hvass will be doing, is looking at PX-402, and he will be explaining how it's different than the Lawson demonstration system.

THE COURT: All right. Is that it on Hvass?

MR. ROBERTSON: Yes, Your Honor, that's all.

THE COURT: As to Mr. Hvass, the motion of the defendant is granted. Mr. Hvass was not listed as -- disclosed as a witness under Rule 26(a) or 26(e). The bottom line is that he wasn't disclosed as somebody who had knowledge of the situation.

He was deposed as -- of the demonstration to be offered. He was deposed as a 30(b)(6) witness on the subject of the Lawson Legacy system, not on other systems -- not on the demonstration or as a factual witness.

The fact of the matter is, when all is said and done, his testimony is an effort to rebut Dr. Weaver's demonstration. To the extent there's a factual part of it, that factual part is a predicate to that end, and he wasn't disclosed as a fact witness, as a person with knowledge of the facts, and those

disclosures -- it's too late to come up with them now.

It can't be justified on the theory that the issue of functionality was in documents that were disclosed, nor as Lawson -- I mean the plaintiff waived the objection by not dealing with it at the final pretrial conference because they didn't learn about it until after the final pretrial conference, exactly what was being done, and they did then timely file an objection to the testimony of Mr. Hvass.

So the motion is granted as to Mr. Hvass. The next issue is Mr. Lawson.

MR. ROBERTSON: Your Honor, I think, just for the record, I think you misspoke. You said the defendant's motion is granted, and I just wanted --

THE COURT: Yes, plaintiff's motion. ePlus's motion. You are correct. All right, Mr. Lawson's testimony.

MR. ROBERTSON: Yes, Your Honor. Again, we don't object to Mr. Lawson as being not identified on initial disclosures. He was deposed, but, again, he was deposed after the close of fact discovery on the so-called Legacy systems.

The Court has dealt with this ad nauseam and at least on four occasions has issued orders, including a motion in limine which I think was ePlus's motion in limine number four, that the Legacy system has no relevance, they are prejudicial, they will be confusing to the jury. We dealt with this again with the expert report of Mr. Knuth in which they had inserted

the Legacy systems once again, and this time they tried to refer to Legacy system 7.0 as your order -- Your Honor had excluded all of the evidence with respect to the other prior Legacy systems.

If I might just briefly reference docket entry number 381 which was Your Honor's order on July 30, 2010, it said, for the reasons set forth in the record on July 28th at hearing, plaintiff's motion in limine number four to exclude any evidence, expert opinion, or other testimony or argument pertaining to purported demonstration systems for Lawson releases 5.0, 6.0, 6.1 is granted.

After that, Your Honor, we had the issue with the Knuth report, which Your Honor made a ruling on which we're going to address in a minute, in which they tried to inject 7.0, and I think Your Honor in no -- in a very conclusive way indicated that Mr. Knuth could only testify as to source code and excluded any reference to even version 7.0.

You may recall that the defendant had issued a report that had referenced a 7.0. They then did a redline version the next day removing 7.0, and Your Honor made very clear that there would be no testimony about Legacy systems.

What they are doing now and what they've represented to us is that Mr. Lawson will come and he will testify about the, quote, development, unquote, of prior Lawson systems, unquote. Now, they are not specific as to version five, six,

seven, or otherwise, and they've also said that it goes to Lawson's lack of intent which Your Honor expressly addressed in his order excluding these issues.

The problem we're really confronted with now --

THE COURT: You mean number 381?

MR. ROBERTSON: I believe there was a second order, Your Honor, if I can just find it for a second here. I'll give you the exact quote. Permit me indulgence here.

Your Honor, it was in the July 28, 2010, hearing transcript at pages 186 to 187. And you said to the extent that Legacy systems are relevant, the presentation of that evidence would offend Rule 403 because it would cause delay, confusion, and make side trials out of a very difficult case already, and the jury, I expect, I anticipate would be hopelessly confused. I don't think it's pertinent to lack of specific intent to induce infringement either or to discredit ePlus's infringement and damages contentions for the same reason. To the extent it might be relevant, it's a 403 analysis, and the use the pre-2002 systems don't do anything but provide confusion and delay.

On that basis, Your Honor ruled that all of the Legacy systems were to be excluded. Now, earlier, there was one exception with respect to claim six of our '683 patent. You might recall, Your Honor, I withdrew claim six as one of the asserted claims, and so now the defendant has acknowledged

they have no relevance whatsoever, but, yet, they still want to introduce, through Mr. Lawson, the history of the system with references to what its capabilities were prior to 2002, the accused systems, and now that all of the exhibits have been withdrawn or excluded, I'm put in a position where I have no ability whatsoever to even cross-examine the witness or impeach him given the fact that I have no idea what he's going to say as to what these prior art systems did.

As I said, no less than four times has the Court ruled on this now, and we think if this is a wolf, it's a wolf in wolf's clothing, not in sheep's clothing, and I just don't want to be in a position to have to get up there and disrupt the trial if Mr. Lawson is going to try and bring this Trojan horse Legacy system into evidence once again.

THE COURT: All right, who is going to handle this for Lawson?

MR. SCHULTZ: This is Will Schultz again. I think there's one fundamental issue in what Mr. Robertson said, and that is when he said that Lawson is going to use Mr. Lawson to testify about the development of prior Lawson systems.

That is completely inaccurate. In fact, what we said to ePlus in our meet-and-confer conferences is that we would not use Mr. Lawson to testify about prior Lawson systems. We told him, we told ePlus that Mr. Lawson would be used for three reasons; one, the background of the Lawson company. Apparently

there's no objection to that. Two, essentially the competitors of Lawson; three, the development of the accused systems, and I'd like to explain to Your Honor what we meant by the development of the accused systems.

By no means are we going to get into the Lawson Legacy systems by going version five has this feature, version six has this feature. That's not what we're going to do. That is not what we told ePlus that we're going to do, and the mischaracterization in their briefing to the contrary is absurd. We're going to use Mr. Lawson to go through and show how Lawson actually implements a feature that is in the accused system.

THE COURT: Excuse me, Mr. Schultz. Do we have everybody still on the phone? I keep getting these beeps. Do you know what that is? Mr. Carr, are you here? Hello?

MR. CARR: Yes, sir, I had you on mute to cut down the background noise.

THE COURT: Mr. Merritt, are you here?

MR. MERRITT: I'm here, Judge.

THE COURT: Mr. Robertson?

MR. ROBERTSON: Yes, sir.

THE COURT: Mr. McDonald?

MR. McDONALD: Yes, sir.

THE COURT: Okay. Now, Mr. Robertson, is it correct that you don't object to Mr. Lawson testifying background about

the Lawson company or Lawson's competitors?

MR. ROBERTSON: I don't object to that, no.

THE COURT: And Lawson's competitors; is that right?

MR. ROBERTSON: That's correct, sir.

THE COURT: So there's no objection there.

MR. ROBERTSON: I do object, though, to this so-called quote, and this is at page 12 of Lawson's opposition, the, quote, development of the accused system.

THE COURT: He is about ready to explain that. I cut him off to assure that there wasn't any residual issue that I needed to decide. Excuse me, Mr. Schultz. You may now resume, and I apologize for interrupting you.

MR. SCHULTZ: Thank you, Your Honor. The development of the accused systems is the process by which Lawson implements a new feature in its accused systems. For example, if a customer wants a particular feature, let's use Punchout for example, and multiple customers then want to have a particular feature, for example, Punchout, the process that Mr. Lawson will explain is how that actually gets into the system, and we're talking about the accused systems here.

And process is once there's a critical mass, there's a committee that goes through and examines whether it's feasible or not, and then they'll go through and how the developers go through it, and then it will actually get into the version of the system, in this case the accused systems.

THE COURT: And that's all he's going to testify to?

MR. SCHULTZ: That's what he's going to testify to.

THE COURT: So basically he'll get up and say, in very short order, that if they get a request from a customer about a new feature, and there's enough new customers who want it, a committee in the company decides whether it's feasible or not and decides to implement it; is that right?

MR. SCHULTZ: Your Honor, there's one addition to that, and that is that the whole point of that testimony is to show that Lawson does not reverse engineer from other competitors, and it does not take or copy anything from ePlus. That's going to be part of the testimony as well.

THE COURT: Okay, but he's going to answer those questions you just added to that; is that right?

MR. SCHULTZ: Absolutely.

THE COURT: Is that the extent of the testimony you envision by having him say he's going to talk about the development of the accused Lawson systems?

MR. SCHULTZ: Yes, Your Honor.

THE COURT: All right. Mr. Robertson, what's wrong with that? You can't possibly have any objection to that.

MR. ROBERTSON: Well, Your Honor, it's like the proverbial, you know, crack in the dam. What I just heard --

THE COURT: Wait a minute.

MR. ROBERTSON: I wouldn't have an objection to that,

Your Honor. If that's what Your Honor wants to limit him to, fine, but I don't want to hear that the development of the system means that they had this functionality, you know, 20 years ago.

THE COURT: Mr. Robertson, he did not say that the man is going to testify to that.

MR. ROBERTSON: Okay, Your Honor.

THE COURT: Mark this down. Get it from the transcript. Mr. Schultz, that's what this man can testify to; okay?

MR. SCHULTZ: I understand, Your Honor.

THE COURT: The motion is denied -- plaintiff's motion is denied as to Mr. -- the objection to Mr. Lawson's testimony provided that it will be confined to the background of the Lawson company, the identity of Lawson's competitors, and the development of the accused Lawson's systems in this sense and this sense only: That there will be -- if there is a demand for a new feature by a customer and there's enough new customers who want it, then there's a committee that decides what to do and how to do it and whether it's feasible, economically and technically, and that's what was done with the accused system here, and that the process does not include reverse engineering or stealing from ePlus, and that's his testimony and that's it. So for those reasons, the motion is denied as to the objection to Mr. Lawson's testimony. Mr.

Knuth is next. Mr. Robertson.

MR. ROBERTSON: Yes, Your Honor. Mr. Robertson. You will recall that Mr. Knuth was an expert that was added by Lawson to specifically address, under the Court's order, Mr. Niemeyer's source code report. Just to refresh, Your Honor, you will recall Mr. Niemeyer simply read the source code of the accused products and rendered a report. He didn't render any non-infringement opinions.

We were at the hearing with Your Honor, and, in fact, there was an entirely new report, much of which addressed Dr. Weaver's infringement analysis, much of which went outside completely of what the Court had permitted Lawson to do. We presented Your Honor with a motion, and again, if I can just briefly quote, this is from the transcript of the September 7, 2010, hearing at pages 116 and 117.

THE COURT: September 7th, what; 2010 hearing?

MR. ROBERTSON: Yes, sir. It's at page seven of our opening brief, and I'm going to paraphrase if I can because it's fairly lengthy, but after argument, the Court said, if, in fact, Knuth can testify just to source code, then I suppose it's all right to let him testify to that. Is there a part of his report where he testifies just to source code, that's all, and responds to Niemeyer?

Your Honor went to say, I'm talking about source code. I don't want him to get into prior versions, I don't

want him to get into infringement or invalidity. What happens is when you get leeway from the Court, you better stay within it or you get smacked. I'm not going back, and I'm not going to have the effort to be equitable turned into a 180-degree turn.

Skip a little down, Your Honor, you said, when you overstep the bounds at this stage of the proceeding, the only thing I can do is cut it out. If Knuth can testify only on the means of source code, then he can testify and that's all.

Now, seven weeks after Your Honor made that ruling, we got a new Knuth report. Not only was it limited to what the Court had expressly instructed, it was new, expanded, and had all the same opinions in there, and most cleverly sprinkled throughout the report in multiple paragraphs, they just repeated the mantra, source code, to take an opinion that had nothing to do with it and subtly say, oh, and by the way, it relates to source code.

The day after we received this new report, seven weeks after Your Honor had ruled most definitively, we wrote them a letter and said if they did not withdraw this report immediately, that we were going to seek sanctions and costs from the Court. Showing the guilty conscience, they withdrew it the next day.

Now a month after that, we had another conversation with them wherein they expressly stated, and I believe we

attached this as an email exhibit to our reply, that they thought that Mr. Knuth could testify fully as to his original report because, in essence, it was all about source code, where in reality there's probably less than a half dozen paragraphs that address source code issues.

So we find ourselves, Your Honor, at extreme frustration at this point when we are confronted with just a complete disregard for this Court's most expressed order with respect to Mr. Knuth. If he is not confined to these source code issues on Niemeyer, as Your Honor ruled, then we are going to ask for sanctions at this point, Your Honor, because this is just beyond the pale.

THE COURT: Who is going to address this?

MR. SCHULTZ: Your Honor, this is Will Schultz again. Your Honor, I'd like to just point out that we have written several times to ePlus, had meet-and-confers with ePlus regarding the scope of testimony of Mr. Knuth. The bottom line of those meet-and-confers is that we have agreed that Mr. Knuth will not testify as to anything dealing with Dr. Weaver, anything dealing with non-infringement, anything dealing with invalidity.

The point of our correspondence back and forth, the point of what we've always been saying is that Mr. Knuth is a rebuttal witness to Mr. Niemeyer who, by ePlus's admission, is a source code expert. What ePlus is trying to do is say Mr.

Niemeyer can testify to whatever he wants to, it's not source code, even if it's not source code, and now Mr. Knuth cannot rebut what Mr. Niemeyer is doing.

The bottom line here, Your Honor, is -- what we said in our brief is that we will not testify and Mr. Knuth will not testify to anything in his report that originally dealt with Mr. Weaver, non-infringement, or invalidity, and he will constrain every one of his comments on his testimony to source code and his responses to Mr. Niemeyer.

THE COURT: Mr. Robertson?

MR. ROBERTSON: Let me respond and quote from their brief again. This is defendant's opposition. It's document 530 at page 14. It says, in reality, Lawson simply reaffirmed that Mr. Knuth will testify about source code issues throughout his report including not only the paragraphs --

THE COURT: Wait a minute. I don't see this. Page 14?

MR. ROBERTSON: Page 14, sir. In reality, it's about five lines down.

THE COURT: Okay, let me read it.

MR. ROBERTSON: In other words, they're saying source code issues are identified throughout his report, not just the six or seven or eight paragraphs we identified that they claim we, quote, cherry-picked from his report. The reality is, if you look at those paragraphs, that's the only place he talks

about source code. Every other paragraph of his multipage, multi-paragraph report, which the Court has already stricken, are addressed to Dr. Weaver's infringing opinions and more including the Legacy systems which Your Honor also has addressed.

Let me just make one other point if I could, Your Honor. Just two days ago, we received a so-called corrected exhibit list from Lawson in which the Defendant's Exhibit Number 370 is identified as, quote, reserved exhibits as to Keith Knuth. We have no idea what these are. We certainly haven't seen them.

As you know, we had the final pretrial conference three months ago, and for them to serve us some corrected exhibit report with unidentified exhibits to Mr. Knuth's new expert report that was already stricken by the Court, I just think is -- again, I'm sorry, but it's beyond the pale.

THE COURT: Mr. Schultz?

MR. SCHULTZ: Yes, Your Honor. I would like to go back to one of the original things that Mr. Robertson had said, and that deals with the new report that we had provided to ePlus. After the Court's hearing with respect to the original Keith Knuth report, Lawson's understanding on that issue was we needed to go back and provide an undated report based on what the Court had done.

After we provided that report to ePlus, ePlus then

came back and said that's not what its understanding was, its understanding was that we were going to use the original report and limit it to the particular testimony that would be admitted, therefore, source code and dealing with Niemeyer. We agreed, and, therefore, did take away the report.

By no means was that a guilty conscience. It was simply a means of finding a resolution between the parties on what was actually going to happen. Bottom line here, Your Honor, is that we intend to abide by your Court's ruling. We will not -- Mr. Knuth will not address anything dealing with Mr. Weaver. He will not address anything dealing with non-infringement. He will not address anything dealing with invalidity. He will testify to Mr. Niemeyer's report dealing with source code.

THE COURT: Well, Mr. Schultz, as I remember it, the parts of his report were very limited that dealt with source code in response to Mr. Niemeyer, and I haven't gone back to check them all, but my indication is that it was paragraph 16, 17, and 21 through 32, and that was it.

Now, I don't know -- are you saying you are agreeing to confine his testimony to those topics?

MR. SCHULTZ: Your Honor, actually those were the topics -- those were -- the paragraphs that you just recited were the paragraphs that Lawson provided as examples that went beyond, that essentially also included source code.

What ePlus did is they selected portions of paragraph 37, 48, 69 to 70, 82 to 83, 91, and 103 and 104 as the versions that they said included source code. We, as an example, cited back to them paragraph 16 and 17 and 21 to 32 as dealing with JavaScript, Java, COBOL, and XML, FXML, clearly showing that there is more paragraphs to the Niemeyer report that deal with source code than what ePlus had cherry-picked, and we used that term appropriately.

THE COURT: 37, 38, 69, 70, and what?

MR. SCHULTZ: 82 to 83, 91, and 103 and 104.

THE COURT: Mr. Robertson, you agree that 37, 38, 69, 70, 82 to 83, 91, and 103 to 104 deal with source code and rebut Niemeyer; is that right?

MR. ROBERTSON: Your Honor, at page 20 of our brief --

THE COURT: Answer that question.

MR. ROBERTSON: Let me make sure I have these right, Your Honor. It was paragraphs 37, 48 --

THE COURT: 38. No. 37, 38, 69 --

MR. SCHULTZ: Your Honor, this is Mr. Schultz. We also have 48. If I had misspoken before, it was 37, 48.

THE COURT: Okay, sorry. 37, 48, 69, 70, 82, 83, 91, 103, and 104, you believe, Mr. Robertson, that those are source code -- is testimony about source code rebutting Niemeyer; is that right?

MR. ROBERTSON: Your Honor, you'll see at page 20 of our opening brief that we specifically identify those paragraphs, 37, although we believe the first sentence is inappropriate, 48, 69, 70, 82, except the first two sentences, 83, 91, except the last two sentences, 103, except the second sentence, and 104. That's what we think properly falls within the Court's prior order that we represented to Your Honor at page 20 of our opening brief.

THE COURT: Do we have the Knuth report here?

THE LAW CLERK: Yes.

THE COURT: I'm going to tell you something. It just is absurd to me that you all are where you are. It's just silly.

I think -- I was reading my notes wrong. It was the -- the problem I was having was with paragraphs 16 and 17 and 21 to 32, not that they were the okay paragraphs.

So I'm getting the Knuth report, and I'm going to tell you, Mr. Schultz, if you don't show me page and line, the first time I'm not going to entertain any more, exactly where this rebuts Niemeyer.

MR. SCHULTZ: Yes, Your Honor.

THE COURT: I'm not having the mere fact that there's some kind of source code something in there used as a Trojan horse to get something else in, and I really don't like this. So I'm not going to spend my time on it anymore, so you have

one chance, and it begins with paragraph 16. Then we'll go to 17. The first time there's something not there, the rest of it doesn't get in, because this is a waste of my time and yours. You all should be getting ready for trial which is what I'm trying to do.

MR. SCHULTZ: Your Honor, do you have the report yet?

THE COURT: No, she's gone to get it.

MR. SCHULTZ: Okay.

THE COURT: All right, I have the report of Keith Knuth concerning source code, and I'm going to paragraph 16. All right, show me.

MR. SCHULTZ: Yes, Your Honor. Dealing with Mr. Knuth at paragraph 16, it specifically talks about paragraph 21 to 32 of Mr. Niemeyer's report. That's dealing with the JavaScript, the languages, the programming languages that are in Mr. Niemeyer's report. Paragraph 16 specifically deals with Mr. Niemeyer's report, does not get into invalidity, non-infringement, and does not get into what Mr. Weaver talked about. This is specifically dealing with source code issues that Mr. Niemeyer addressed in his report.

THE COURT: Mr. Robertson.

MR. ROBERTSON: Your Honor, let me cut this short, because I know your patience is probably getting to an end.

THE COURT: My patience is not inexhaustible, but my nickname is Job. But I don't have patience for people who

don't do their homework and cause me to have to go through something that makes no sense, and it looks to me like Mr. Schultz is right based on the text of paragraph 16 of the Knuth report.

MR. ROBERTSON: All I was going to say, Your Honor, is, all this says is that ePlus didn't invent these source code languages, programming languages. I'll stipulate to that, so I don't have a problem with paragraph 16. That doesn't -- we don't claim that we did in our patent.

MR. SCHULTZ: Your Honor, this is just an attempt to try to resolve this issue.

THE COURT: 17.

MR. SCHULTZ: To the extent that Mr. Knuth, in his report, refers specifically to Mr. Niemeyer, it seems to Lawson that that is in the Court's order that he's able to respond to that. Am I reading that correctly, Your Honor?

THE COURT: I'm not giving an advisory opinion on that, and I can't -- the answer is I can't do it because the way you all have these opinions written, there's so much interconnection between stating X and then amplifying it to the fact that X actually equals Y and Z, it's a problem for me. I can't agree to that.

This says, in addition to the program languages discussed by Mr. Niemeyer. So you mention him, and then you go on to a whole lot of functional code in paragraph 17. That

doesn't seem to me -- you're talking about the functional code within the software is written in proprietary language called 4GL. It's a programming language developed by Lawson to increase efficiency. What do you say about that, Mr. Schultz?

MR. SCHULTZ: Yes, that's to clarify what Mr. Niemeyer is talking about in paragraphs 21 to 32 of his report. Essentially, what Mr. Niemeyer is doing is he is talking about the programming languages. Mr. Knuth is clarifying what the actual system language is, in other words the source code of the Lawson system. It's the 4GL. It's a proprietary language.

MR. ROBERTSON: It's not relevant to anything, but you know what? Let's move on. You know, if he wants to make this statement at trial, I don't see the relevancy to the infringement issues, but I don't have a problem with it.

THE COURT: Which 21 to 32 are you talking about? Does Knuth's paragraphs 21 and 32, do those paragraphs correspond to Niemeyer's 21 through 32?

MR. SCHULTZ: No, Your Honor. What the illustration was that we had in the brief and in the correspondence to ePlus was that paragraph 16 and 17 of the Knuth report respond to paragraphs 21 to 32 of the Niemeyer report. In other words, what we're doing is we're saying there is this connection between source code that Mr. Niemeyer is talking about and what Mr. Knuth testified to --

THE COURT: Go read your paragraph page 14. In

reality, Lawson simply reaffirmed that Mr. Knuth testified about source code issues throughout his report including paragraph 16 and 17 and 21 through 32.

Now, you keep talking about Niemeyer's report 21 through 32, and I asked you are those are the same numbered -- are they correlative numbers, and you said no, but I want to get this finished and decide -- do you agree, Mr. Robertson, that he can put in paragraphs 16, 17, 21 through 32 of the Knuth report; yes or no?

MR. ROBERTSON: No. 16 and 17, yes. 21 through 32 have nothing to do with the source code. It's basically Mr. Knuth testifying on functionality and supposedly what the architecture of the S3 software does. He doesn't discuss source code anywhere in this paragraph, Your Honor.

THE COURT: Where does he discuss source code in those paragraphs, Mr. Schultz? I don't see it, but it could be I don't understand. Tell me where in those paragraphs is there any discussion of source code.

MR. SCHULTZ: What he is doing, Your Honor, is --

THE COURT: I didn't ask you that. I said show me where in that paragraph, sir, there is any discussion of source code.

MR. SCHULTZ: Paragraph 21 is responding to Niemeyer report at 41 to 157. It specifically responds to that report, Mr. Niemeyer's report, that deals with source code of the

Requisitions Self-Service Punchout and Requisition creation tabs. Those paragraphs -- this is a perforatory paragraph, paragraph 21.

It then gets into the specifics of the source code starting in paragraph 22 that starts about describing the IC module. It specifically identifies by paragraph 22 the inventory control user guide, what we're talking about here that deals with the source code.

MR. ROBERTSON: I might briefly respond, Your Honor. That's exactly right. It's addressing user guides that are not source code. What Mr. Niemeyer did was he read the source code and said, here's what the source code discloses.

What Mr. Knuth is purporting to do here is to make non-infringement arguments based on documentation that has nothing to do with the source code. User guides are not source code, and you'll see throughout all those paragraphs cited not one place, not one citation to anything is there any reference to the actual source code of the accused software at issue here.

MR. SCHULTZ: Your Honor, for example, at paragraph 26, it specifically refers to the S3 application source code and identifies the specific Bates number that goes along with that. This whole line of paragraphs here under paragraph B, including 21, all the way through deal with Mr. Niemeyer's specific report which, according to ePlus, must deal with

source code.

MR. ROBERTSON: I'm sorry. Can you please, Mr. Schultz, direct me in paragraph 26 to the specific source code reference you are making, because I don't see anything in there.

MR. SCHULTZ: Paragraph 26, third line up from the bottom it says, see generally S3 application source code with the Bates number L0135743. Furthermore, after that, if I go back to the user guide, paragraph 22 that I was referring to, I'd refer you to Mr. Niemeyer's report where he specifically includes that specific document in his report.

Mr. Knuth is responding to Mr. Niemeyer and his use of the user guide, so obviously he's using that in his source code report. It's on footnote eight on page seven of Mr. Niemeyer's report.

MR. ROBERTSON: I must have a different copy of the expert report because I don't see any reference in paragraph 26 -- I apologize -- that has anything to do with referencing any specific source code document.

MR. SCHULTZ: Excuse me, Mr. Robertson. Do you have an electronic copy, because you can do a search for that.

MR. ROBERTSON: I have a hard copy in front of me.

THE COURT: Read your paragraph 26, Mr. Robertson.

MR. ROBERTSON: Mr. Niemeyer indicates that Lawson System Foundation is required to run any of the individual

software modules --

THE COURT: That's not the text of paragraph 26 of the report that I have.

MR. SCHULTZ: Mr. Robertson, you are reading from what we have as paragraph number 27. If you look back at the paragraph before that, that's where it states application source code.

MR. ROBERTSON: I apologize. I was looking at the newly revised version you sent me after the Judge ruled, so let me get to the proper paragraph which I gather is 27.

THE COURT: 26.

MR. ROBERTSON: Is that right, Mr. Schultz? I just want to be on the same page.

THE COURT: Paragraph 26, page eight, of the report dated -- what's the date of this thing?

MR. ROBERTSON: Okay, Your Honor --

THE COURT: Dated August 25, 2010.

MR. ROBERTSON: I have it now, sir.

THE COURT: Look how much time you all took because you're not dealing with the right reports.

MR. ROBERTSON: Here again, Your Honor, last line of 26 says, again, dealing with this Legacy system, which Your Honor has already ruled should be out of the case, last sentence, I am aware of earlier versions of the S3 software that include these modules dating back to at least the 1980s.

MR. SCHULTZ: And, Your Honor, Lawson has already agreed not to testify about those issues that are in this report. This is a moot issue. We've already agreed to comply with the Court's orders.

THE COURT: I'm going to tell you something. Mr. Merritt, you and Mr. Carr work with these people and make sure whether we have a problem or not as to -- right now Knuth can testify to 37, 48, 69 and 70, 82 to 83, 91, 103, and 104 with the exceptions of the sentences that ePlus objected to and to paragraphs 16 and 17 of his report.

As to the 21 through 32, I'm not sure that you all -- of the Knuth report of August 25th, I'm not sure you all are even singing from the same sheet of music, and you're wasting my time here having to deal with it. Mr. Merritt and Mr. Carr, I charge you with the responsibility of sorting it out. That's it.

MR. CARR: Sorting it out, sir, is that what you said?

THE COURT: Sorting it out. I want it done right, please.

MR. CARR: Yes, sir, we'll do that.

MR. MERRITT: Yes, sir.

THE COURT: Next issue is what, J-CON? Is that what we're dealing with?

MR. ROBERTSON: Yes, sir.

THE COURT: We're going to take a recess, give the court reporter and the rest of us a little break. I guess the best thing to do is, can you call back in?

MR. MERRITT: Yes, sir. We can reset the call. You tell us how many minutes, and I'll reset it that far from now.

THE COURT: Four o'clock, and it is -- by my watch, it is 3:37. Thank you.

(Recess taken.)

THE COURT: Hello.

MR. MERRITT: Yes, sir, Judge. We have the same group reassembled.

THE COURT: Okay. The next issue -- just a minute. I want to dislodge these things from my desk, put them on Ms. Haggard's responsibility.

The next issue relates to the effort to exclude J-CON because Shamos relies on -- excuse me, to exclude Shamos's testimony about the J-CON system because Dr. Shamos does not cite any evidence to support his J-CON obviousness theories; is that where we are?

MR. ROBERTSON: Yes, I think that's where we are.

THE COURT: All right.

MR. ROBERTSON: I'm happy to address that issue. Do we have a better connection?

THE COURT: Yes, we have a much better connection. And the way the briefing shakes out, it looks to me is that he addresses it, and 96 is the position of -- in Exhibit 96 is the position of Lawson; is that right, Mr. McDonald -- who is going to deal with it for Lawson?

MS. STOLL-DeBELL: Your Honor, this is Ms. Stoll-DeBell, and I will be addressing it. Which exhibit are you talking about, though?

THE COURT: Well, it's Dr. Shamos's testimony on J-CON, and they say that basically he can't testify to it because 97 and 98 have been excluded; isn't that right, Mr. Robertson?

MR. ROBERTSON: Yes, Your Honor. I have additional arguments to make, but, in essence, that's right, consistent with your order of November 19, 2010, that was docket entry number 516.

THE COURT: What does that say?

MR. ROBERTSON: In pertinent part, Your Honor, it says that Dr. Shamos does not rely in any way on DX-97 or 98 to support his obviousness opinions. You also found that DX-112 was not disclosed in responses to interrogatories, and accordingly, you ruled that the motion is granted and any testimony related thereto or based thereon are excluded from admission at trial.

Your Honor is correct that DX-96 was also cited, but

it was never cited in support of any obviousness opinion. It was only cited in support of an anticipation opinion, and I think I can say confidently, because I'm reading from the defendant's brief, that the defendant has conceded that Dr. Shamos had only one anticipation claim related to the patents at issue. That was claim six of the '683 patent which ePlus has since withdrawn, and this is at page 15 of their opposition at note, footnote nine. So there are no longer any anticipation claims based on J-CON.

The fact is, in his report, he never identified any exhibits as relying on for an obviousness opinion which is why Your Honor struck DX-97 and 98. You have the benefit of your own order on November 19th. What happened here then is in response to our motion, the defendant submitted some charts which they relabeled as combinations or obviousness charts.

For example, it would be their Exhibit G which they call the J-CON/Dworkin claim chart in order to suggest that there was some obviousness argument. If you look at that chart, and I say this generously, it has been doctored in the sense that it was an anticipation report that was multi-columned in which they deleted several, probably a half dozen columns in order to put juxtaposed an anticipation argument they had made for J-CON next to an anticipation argument they had made for Dworkin, and now they simply relabeled it as an obviousness argument in order to try to

avoid the import of Your Honor's order of November 19, 2010.

The same reasoning that Your Honor applied in that order wherein that Dr. Shamos makes no reference to DX-97, 98, or for that matter DX-96, and it's conceded that he has no anticipation arguments, we would think it would apply equally to DX-96. Having had that same law of the case applied, there simply is no J-CON prior art defense.

Let me just point out to you one other thing, Your Honor. If you look at Exhibit 39 to our reply brief which was filed on December 21st, you'll see an invalidity analysis done by Dr. Shamos. This is not our document. This is Dr. Shamos's document, and he addresses all the asserted claims for both P.O. Writer and J-CON. In two columns, he identifies all the bases for his opinions, and in every instance, every instance his opinion is that those claims are anticipated by P.O. Writer and J-CON, no obviousness analysis.

His obviousness analysis is some conclusory paragraphs which Your Honor has already determined were conclusory with respect to the other exhibits and cites to no exhibits whatsoever including, as Your Honor noted, DX-97, DX-98, or DX-96.

Given all that we were provided with was our anticipation argument, for the defendant at this point to simply relabel them, relabel these anticipation arguments as obviousness in order to try and do an end-around of the Court's

order, we think is entirely improper at this late date.

THE COURT: Ms. Stoll-DeBell.

MS. STOLL-DeBELL: Yes, Your Honor. We are not relabeling anticipation arguments as obviousness arguments. Dr. Shamos, in his report, gave an opinion that J-CON plus the Dworkin patent rendered the claims obvious and a second opinion that the combination of J-CON plus P.O. Writer rendered the claims obvious. And, Your Honor, we provided you with a copy of Dr. Shamos's entire report this morning. I don't know if you have that in front of you.

THE COURT: Just a minute. Wait a minute. I do have it. I need to get to it here.

MS. STOLL-DeBELL: Okay. I'm going to direct you to some paragraphs that show you how Dr. Shamos disclosed his obviousness --

THE COURT: Well, first tell me where he has those opinions. Where are they?

MS. STOLL-DeBELL: They are in multiple places in his report and in his claim chart, so if you go to -- do you have the main body of his report?

THE COURT: I have the report, and it's 83 pages with his CV, and it's dated May 5, 2010, on page 76. Is that it?

MS. STOLL-DeBELL: Okay, Your Honor, yes. If you would go to paragraph 102, please, on page 26.

THE COURT: Page 26, 102.

MS. STOLL-DeBELL: And in this paragraph, you'll see --

THE COURT: Wait a minute. Let me get there.

MS. STOLL-DeBELL: I'm sorry. It's a little hard on the phone.

THE COURT: Okay.

MS. STOLL-DeBELL: Here he's talking about what Exhibit 3 is, and he says Exhibit 3 is an integral part of his report, and it contains a claim chart demonstrating the invalidity of each asserted claim.

Now, Mr. Robertson just told you that the claim chart is an anticipation claim chart. That's simply not true. It's an invalidity claim chart that disclosed his opinions based upon anticipation and obviousness, and you can see that he says that right here in paragraph 102.

Now, if you turn the page, Your Honor, to paragraph 104 --

THE COURT: Wait a minute. I don't see where he says that.

MS. STOLL-DeBELL: Okay, he says Exhibit 3 which is the claim chart contains a claim chart demonstrating the invalidity of each asserted claim.

THE COURT: Yes, but he doesn't mention -- what is the basis?

MS. STOLL-DeBELL: I need to go to other places to

show you that, Your Honor, so I'm going to do that now. My point with that sentence is he doesn't say it's an anticipation claim chart, and he doesn't say it's an obviousness claim chart. He says it's his invalidity claim chart that demonstrates his invalidity opinions for each asserted claim. Then if you go to paragraph 104 on the next page, Your Honor.

THE COURT: Yes.

MS. STOLL-DeBELL: Okay. He says, to the extent that any reference listed in this report as anticipating any of the asserted claims is not deemed to be anticipating, it is my opinion that any missing element or step would have been obvious in light of the art referenced in this report with the motivation to combine as explained herein.

So he, I think, again is saying that claim chart, it may be anticipation and obviousness, and I'm going to tell you how that is throughout this report. So, again, Exhibit 3 is not just an anticipation claim chart. It's both.

Now, Your Honor, if you can turn to page 67 starting at paragraph 229.

THE COURT: Just a minute. Okay.

MS. STOLL-DeBELL: Are you there?

THE COURT: Yes.

MS. STOLL-DeBELL: Now, these are his paragraphs where he talks about the motivation to combine J-CON with Dworkin, and specifically in paragraph 230 -- now, again, he

says, one of my opinions is that J-CON anticipates all of these claims. But he also says in paragraph 230, it's also my opinion that it renders the claims obvious when combined with this Dworkin patent, and he says in the second sentence there, the combination teaches all of the elements of asserted claims, and he lists the claims he is going to use, as shown in Exhibits 3 and 4.

So right here, Your Honor, he's saying, I have an opinion that J-CON plus Dworkin rendered these patents obvious, and if you want to see my claim-by-claim analysis of where each of these references discloses each element, go to Exhibit 3, that claim chart. Then he goes on to talk about why he thinks there's a motivation to combine these two references.

Now, if we look at --

THE COURT: Wait a minute. You are relying on paragraph 230 then; right?

MS. STOLL-DeBELL: That, plus 102 and 104 to say that Exhibit 3 is not just an anticipation claim chart. It's anticipation and obviousness. Then we can go to, Your Honor --

THE COURT: What about 231 through 234, what is that?

MS. STOLL-DeBELL: He is talking about why one of ordinary skill in the art would be motivated to combine J-CON plus Dworkin.

THE COURT: And that is obviousness --

MS. STOLL-DeBELL: Yes, it's obvious to do so.

Because you need -- for obviousness, you need to show that each claim element is in one or more of the references you are combining, and then you want to say, and not only that, but one of ordinary skill in the art would combine them.

THE COURT: All right.

MS. STOLL-DeBELL: That's what the rest of those paragraphs are about.

THE COURT: All right.

MS. STOLL DeBELL: Now, Your Honor, if you could turn to our Exhibit G that we filed in support of our opposition brief.

THE COURT: I don't have that with me here. I have to go get it.

MS. STOLL-DeBELL: Okay. Your Honor, could you -- do you have Appendix A also? That one goes with it. Appendix A and Exhibit G.

THE COURT: Appendix A to what?

MS. STOLL-DeBELL: Appendix A to our opposition brief.

THE COURT: I think I do have that here. Let me see.

MS. STOLL-DeBELL: It's docket 530-11.

THE COURT: I have the brief. I just don't know if I have the appendix here. No, I don't have Appendix A. I've got Exhibit G. What about Exhibit G?

MS. STOLL-DeBELL: Exhibit G is a portion of that

Exhibit 3 claim chart that we just read about. Now, Exhibit 3 claim chart, Your Honor, was always meant to be a Microsoft Excel document. He has something like 28 different columns for each of the different pieces of prior art that Dr. Shamos uses. To print it, to print the things that are relevant for you to see, I did, in fact, hide some of those columns, and the columns I hid related to like the Gateway reference that we withdrew and some of the other references that are no longer part of this case for one reason or another, either we withdrew them or they were excluded. So I didn't print those for you.

I wanted to make it big enough so that you could read it and put in what is relevant, and so what you see here are the columns from that claim chart that relate to J-CON and Dworkin. So this also is Dr. Shamos's opinion that supports, you know, the opinion he disclosed that he believes it would be obvious to combine J-CON plus Dworkin, and when you do so, they teach all of the elements of the claims, of the asserted claims.

So for Mr. Robertson to say that Dr. Shamos did not disclose his opinion that J-CON plus Dworkin renders the claims obvious is just wrong. We've just seen that he did, in fact, do that, Your Honor.

THE COURT: All right, Mr. Robertson --

MS. STOLL-DeBELL: That was my first point. If I can move to the second point, Your Honor.

THE COURT: I don't want you to go to P.O. Writer.

MS. STOLL-DeBELL: No, my second point for J-CON. Mr. Robertson showed you, I think it was his Exhibit 39, and that was a portion of another claim chart that Dr. Shamos had as part of his report. Do you have that in front of you, Your Honor?

THE COURT: No. I can't possibly keep all these exhibits in my office.

MS. STOLL-DeBELL: Okay. Well, in any event, the point of that is it was Exhibit 4 that we just read about, it also relates to both anticipation and obviousness. When we looked at those paragraphs of Dr. Shamos's report, he said, my obviousness opinions are disclosed in Exhibit 3 and 4.

You know, the fact of the matter is Dr. Shamos did give an opinion that J-CON anticipates the claims, and he gave an opinion that J-CON in combination with Dworkin and J-CON in combination with P.O. Writer render obvious the claims. For various reasons he's not going to get into anticipation at trial, but that doesn't mean he didn't disclose his obviousness opinions. He did. He very clearly did. He's got element-by-element citations to that Exhibit 96 which is in evidence, Your Honor.

Now, you know, the motion or the order that Mr. Robertson referred you to, that related to two other J-CON exhibits and they are out, but Exhibit 96 has always been in

this case. It was stipulated. It's a stipulated exhibit, and in our Appendix A we show you element by element where Dr. Shamos, in his report, whether it's his claim chart or the main body of his report, cited to that admitted Exhibit 96.

THE COURT: Where on Appendix A?

MS. STOLL-DeBELL: You can look at the first page. This is sort of element by element for each claim, but the middle column is citations to Exhibit DX-96.

THE COURT: I've got it -- it doesn't say 96.

MS. STOLL-DeBELL: So, Your Honor, when Dr. Shamos put his claim chart together, we didn't have trial exhibit numbers.

THE COURT: Is that the same as Exhibit F?

MS. STOLL-DeBELL: Exhibit F is the -- no. Exhibit F is the claim chart we filed in our opposition --

THE COURT: He's referring to Exhibit G then; is that right?

MS. STOLL-DeBELL: No, Your Honor. You are in Appendix A; right?

THE COURT: Yes.

MS. STOLL-DeBELL: Go to the middle column and go down to the bottom.

THE COURT: You mean the last page of the appendix?

MS. STOLL-DeBELL: No, I'm on page one, and I'm in the middle column of that table you see on page one.

THE COURT: Yes, it says admitted exhibits relied on by Dr. Shamos for J-CON.

MS. STOLL-DeBELL: Okay. So Exhibit F is Dr. Shamos's actual report.

THE COURT: Yeah.

MS. STOLL-DeBELL: And then we quoted from that report. So at paragraph 196 of Dr. Shamos's report, he says, the J-CON manual described, and it goes through that quote. That quote is from the DX-96, and you can see that because I put in a parenthetical at the end of that, DX-96.

So all I did is I went into his report, and every time he quoted from or cited his DX-96, I put it in this chart to show you he extensively relied on DX-96 and will do so at trial.

THE COURT: Okay.

MS. STOLL-DeBELL: If you flip through this, Your Honor, you'll see there's something for every element. There's a citation to either DX-96 or to that Dworkin patent which is also admitted.

For every element of these claims, we will have Dr. Shamos get up and give the opinion he properly and adequately disclosed in his report and talk about the motivation to combine these two that he said in his report, and we ought to be able to do that, Your Honor. We properly disclosed it.

THE COURT: All right, Mr. Robertson.

MR. ROBERTSON: Yes, Your Honor, thank you. I know there's a lot of paper we're shuffling here, but if you could refer back to what was Exhibit G to defendant's opposition, the chart.

THE COURT: I've got it.

MR. ROBERTSON: I'd like to take you, first of all, there's a column S there which says Shamos opinion re J-CON.

THE COURT: Yes.

MR. ROBERTSON: Bottom of page two, opinion, claim one is anticipated by J-CON. I can skip you further, on page 14, same column, Shamos opinion re J-CON. Column 21 is anticipated by J-CON.

THE COURT: Wait a minute. Page 14?

MR. ROBERTSON: Yes, sir. Midway through the page. Are you with me, sir?

THE COURT: I am now.

MR. ROBERTSON: Okay. Skipping ahead to page 19, same column on the bottom of the page, claim 29 is anticipated by J-CON.

THE COURT: Look over there at the column, the next one down, J-CON renders claim 29 obvious when combined with the Fisher. Oh, that's not Writer, P.O. Writer or the other one, okay.

MR. ROBERTSON: Indeed, Your Honor, those were in answers to interrogatories that were not in the second

supplemental instruction that Dr. Shamos actually specifically disclaimed by saying that the claim charts contain matters Lawson's interrogatories that are distinct from my opinions, not I express my own opinions in the columns containing headings beginning Shamos opinion.

There's no question that Dr. Shamos is making these opinions. I'm not going to belabor the point, Your Honor, but if you go through every single example that's in Exhibit G, every instance Dr. Shamos made an anticipation opinion and an anticipation opinion only.

THE COURT: Well, wait a minute. It's obvious from that exhibit that he made an anticipation opinion, but he also says in a couple of places to the extent that they are not anticipated, they would have been obvious in these answers in 102 or 104.

Is it your argument that he doesn't give any details about obviousness, that what he does is just give a conclusory opinion about obviousness and that's insufficient under the case law?

MR. ROBERTSON: That's exactly right, Your Honor.

THE COURT: Why isn't that right, Ms. Stoll-DeBell? You are trying to -- as I understand your argument, you want me to look at Exhibit G. Exhibit G, he doesn't give any obviousness opinions under the category of Shamos opinion. He gives anticipation opinions, and then you want me to go look at

the photographs 102, 104, and I think 231 or something, and because he says to the extent they are not anticipated, they are obvious, conclude that he's given an obvious opinion but he hasn't given the detailed obviousness. He hasn't gone through the obviousness drill in his opinions it doesn't look to me like.

That's what you're asking me to do, isn't it, is to say because he just sort of conclusorily adopts -- says, well, if they're not anticipated they are obvious, then that's -- you're saying that's sufficient; isn't that right?

MS. STOLL-DeBELL: No, that's not. He gives detailed opinions. He says, Exhibit 3 is anticipation and it's obviousness, and he says at paragraph 230, it's obvious when combined that you can see where each of those references discloses each claim element in Exhibit 3.

THE COURT: Where is Exhibit 3?

MS. STOLL-DeBELL: Exhibit 3 is Exhibit G.

THE COURT: Oh, okay.

MS. STOLL-DeBELL: Your Honor --

THE COURT: Wait a minute. You have to understand something. You all are so into this case that you use shorthand. To me, Exhibit G contains nothing but anticipation opinions. Now, show me in Exhibit G where he says anything about obviousness under the heading Shamos opinion re J-CON. Take me to a page that says that.

MS. STOLL-DeBELL: Your Honor, I don't think he does in Exhibit G, but he says at paragraph 230, Exhibit G is my obviousness.

All Exhibit G is is a citation to the documents that he's going to use to say --

THE COURT: Wait a minute. 230 says, to the extent that J-CON is not deemed to anticipate any asserted claim, it is my opinion that such claim would have been obvious in view of the combination of J-CON with Dworkin. Combination teaches all of the elements asserted, of asserted claims three, six, 26, 28, and 29 of the '683 patent, asserted claims one, two, six, nine, 21, 22, and 29 of the '516 patent, and asserted claim one of the '172 patent as shown in, and now he talks about Exhibit G. It says Exhibit 3, but you say that's the same thing.

As such, the combination of J-CON and the '940 patent renders these claims invalid. Well, to me, all he's done is make a conclusory statement sort of in the alternative that, well, if you don't agree with anticipation, it's obviousness. But he hasn't really explained obviousness which the Federal Circuit requires be explained in a lot more detail than appears in paragraph 230.

MS. STOLL-DeBELL: Okay. So 230 cites to Exhibit 3 which is Exhibit G. And in Exhibit G, he says element by element here's where J-CON discloses this element, here's where

Dworkin discloses this element. So he's got an element-by-element analysis for each of the two references he says equal his obviousness combination.

So that is sufficient by the Federal Circuit. ePlus knows exactly what he's going to get on the stand and say. J-CON is an electronic sourcing system, it teaches this element, go see this page of the DX-96, and Dworkin has this, go see this page of the Dworkin patent. So the only other thing we needed to do for obviousness is say, why would someone put those two together.

Find element by element in each reference you're going to say, you know, that reference teaches that element, and in the body of his report, he says this is why there would be a reason to combine.

THE COURT: You mean paragraph 231 through 234?

MS. STOLL-DeBELL: Right. So he says, one of skill in the art would have been motivated to make the combination because the '940 patent states -- this is paragraph 232 --

THE COURT: Why didn't you have him say -- why doesn't he say, in my opinion, in the Shamos opinion -- why wouldn't you have him say that it's obvious? He doesn't --

MS. STOLL-DeBELL: It does.

THE COURT: It doesn't say it in the -- in his own summary of his exhibit that says Shamos opinion -- he says it re J-CON, but he doesn't say it re the combination. He says

anticipation. He doesn't say -- he doesn't say anything about the combination being obvious except his --

MS. STOLL-DeBELL: He does in his report. He says it in his report at paragraph 230. Does he need to say it four times instead of three times? You know, the fact of the matter is ePlus --

THE COURT: The fact of the matter is that this guy's report is babble and gobbledygook, and you all are going to get crucified at trial with it because you can't follow anything he's said or done, and that's exactly the problem I have with this guy.

He's cute. He's real cute here. He gives long opinions on anticipation, and then he sort of puts -- you can see what he did. He added 230 right at the end as an obviousness, and he doesn't really explain why. And even under the -- even if you compare Shamos opinion page seven, for example, claim one is anticipated by J-CON under Shamos opinion re Dworkin, claim one is anticipated by Dworkin. He doesn't talk about the combinations being obvious.

And the same thing, what he's doing is he's giving the reasons why in this Exhibit G, on all these claims why they are anticipated, but he's not saying why they are obvious, and it's just kind of silly, and I don't know how you can be allowed to do this kind of thing.

MS. STOLL-DeBELL: Your Honor, it says in the title

above paragraph 223, for example, the combination of RIMS plus Dworkin is obvious. I guess I didn't think he needed to copy the exact same data and put it into a claim chart and make this claim chart another -- you know, that much longer.

It's all the same information. He has an element-by-element cite to each reference. He says the combination renders these claims obvious, and this is why one would be motivated to combine them. That is what we need to put forth under Federal Circuit law to show something is obvious.

Now, the fact that he also says it's anticipated doesn't mean it can't also be obvious. There are two theories, and he disclosed both of them, and he --

THE COURT: Was he deposed --

MS. STOLL-DeBELL: And on top of that, Your Honor, they deposed him. They asked him questions about this claim chart. This is the first we've heard about any of this.

THE COURT: Was he deposed about these questions, this chart, Exhibit G, and these paragraphs on the topic of obviousness as opposed to anticipation?

MS. STOLL-DeBELL: Yes. Ms. Albert asked him, they went through, and that was the entire Exhibit 3, so it had the columns for, you know, the other prior art that has been withdrawn like Gateway.

THE COURT: You don't need to tell me about that.

MS. STOLL-DeBELL: Okay, but, yes, she did, and I looked at it today. She absolutely went through this claim chart. He explained it to her. He explained Exhibit 4 to her. He explained the obviousness. She asked me questions about it.

THE COURT: So notwithstanding the conclusory nature of the report, you are saying that they understood and knew that he was using the same reasoning as he used for anticipation that he was using for obviousness; is that right?

MS. STOLL-DeBELL: Yes, Your Honor, and he says that. He says that in those paragraphs I cited you to, paragraphs 102, 104, and 230. He says, I'm using the same reasoning that I'm using for anticipation for obviousness. And it makes sense. He's looking at the same documents, and he's talking about the same claim elements.

THE COURT: Well, you know, the problem is that isn't what he says. He says the same reasons for making the previous two combinations apply to combining J-CON system as described in the J-CON with P.O. Writer, blah, blah, blah. He doesn't say exactly what you said. Well, that's in 235. Let's go back to 230. He doesn't say he's using the same reasons. It doesn't say it.

But, Mr. Robertson, it looks to me like you had a chance to depose him about it and that the objection would have been to the report itself, not to try to exclude it at this stage of the proceedings given that you know -- and your man is

going to be able to respond to this, isn't he?

MR. ROBERTSON: We did not respond to opinions that were not offered. When we took Dr. Shamos's deposition, what we did was pin him down to the opinions he gave. Those were anticipation opinions. We actually pointed out that he did not make any kind of reasoned articulation that is required for an obviousness analysis which Your Honor has picked up upon.

If you look at, for example, paragraph 231 of Dr. Shamos's report, it says, one skilled in the art would have been motivated to make the combination because, and then there's nothing else there. So how are we to know what part of, for example, J-CON, from what element of the claim that Dr. Shamos is relying upon and what part of Dworkin for what element of the claim Dr. Shamos is relying on if he provides no analysis whatsoever.

And if I could just direct the Court to page 16 and 17 of our reply brief and cite to you the *Innogenetics* case v. *Abbott Labs*, and the citation for that is 512 F.3d 1363 and specifically at 1373. It's a 2008 case, so it is a post-KSR case from the Supreme Court on this issue of obviousness.

THE COURT: What page?

MR. ROBERTSON: If you will permit me, I won't belabor it, but I'd like to read to you because I think its consistent exactly with Your Honor's thinking here.

THE COURT: What page?

MR. ROBERTSON: Page 17, Your Honor, of our reply brief.

THE COURT: It's the cite to *Innogenetics v. Abbott Labs*. Your paragraphs begins on page 16?

MR. ROBERTSON: Yes, sir.

THE COURT: Have I given you the view that I'm unable to read, I've lost my capacity to read?

MR. ROBERTSON: No, sir. I'll take that as a given that you've read the case and understand its point.

THE COURT: Do you have anything else other than what's in the brief that you want to direct my attention to in that case?

MR. ROBERTSON: The only thing I would like to say is nowhere did we ever receive obviousness claim charts from Dr. Shamos with respect to either J-CON or P.O. Writer, and we were entitled to that under the discovery that we asked for, and to simply say after the fact when anticipation claims have been struck or withdrawn that they can suddenly magically transform into obviousness claims, we think is, again, improper and in violation of the Rule 26 disclosures that were required. That's all I would say, sir.

THE COURT: What about J-CON, Writer? It's the same argument, isn't it?

MR. ROBERTSON: Yes, sir. It's the same argument, and it's the same reasoning that Your Honor applied in your

order of November 19th when it said if these exhibits weren't specifically referenced and they weren't provided with the proper analysis, then the expert should be excluded and the exhibits should be inadmissible.

MS. STOLL-DeBELL: Your Honor, I do think it's the same issue for J-CON and Dworkin plus J-CON and P.O. Writer, but I would like to point out that ePlus's invalidity expert, Mr. Hilliard, did address these issues in his report, and I deposed him on it. We talked about the combination of J-CON with the other references.

Dr. Shamos has four combinations in his report, obviousness combinations, and I asked Mr. Hilliard about it, and Mr. Hilliard addressed it. So for ePlus to say that they haven't had the opportunity to respond or didn't respond is just wrong. These have been since they were disclosed in our interrogatories responses, they were in our second supplemental responses, they were in Dr. Shamos's report, Mr. Hilliard rebutted them, Ms. Albert deposed Dr. Shamos on them, and I deposed Mr. Hilliard on them.

There is nothing that -- I mean, they know everything. They know where for each element we're going to rely, and they know why he's going to say there's a motivation to combine.

MR. ROBERTSON: Your Honor, just briefly, we don't know everything. We know what's been said in paragraph 230

which is as conclusory as you can get that somehow combination teaches all of the elements. Dr. Hilliard addressed a lot of prior art that's now been either excluded by the Court or voluntarily withdrawn. Of course he had to do that, and if he's asked the question, he's going to answer it during his deposition.

That doesn't mean that that alleviates the unfair surprise that's resulted from a failure to disclose under Rule 26.

MS. STOLL-DeBELL: Your Honor, I mean, if you look at Exhibit G, I can go right to page two and say, okay, electronic sourcing system.

THE COURT: Wait a minute. I've got to get to Exhibit G. What page?

MS. STOLL-DeBELL: I'm just on page two.

THE COURT: Okay, let me go. All right.

MS. STOLL-DeBELL: So I'm just looking at the first element, an electronic sourcing system, which is row 15. Shamos says, here is where, you know, there is proof that J-CON is an electronic sourcing system. That's in column F. In column Z, he says, this is where Dworkin says that. This is the element-by-element disclosure.

THE COURT: But that's anticipation.

MS. STOLL-DeBELL: It's both, Your Honor.

THE COURT: He doesn't explain that it is. He just

talks about it in terms of anticipation, and he talks about it in the preceding column, obviousness was combined with RIMS and Doyle and P.O. Writer and SABRE and the Gateway or IBM. What is that column? What is that?

MS. STOLL-DeBELL: Where are you at?

THE COURT: Column R.

MS. STOLL-DeBELL: This is citations he pulled from Lawson's interrogatory responses.

THE COURT: And they are not his, so he's --

MS. STOLL-DeBELL: I think they are his. He said he -- he said very clearly in his report, I think it was at paragraph 103, I adopt Lawson's prior art citations. Then he says, I don't necessarily adopt their opinions. He says, I don't necessarily adopt their opinions.

That doesn't mean I don't adopt them, and if you look, Your Honor, at page one of Exhibit G, he has his little color coding scheme there. I'm on page one, and I'm at row A-8, and you will see a gray cell. It says, a cell with gray shading indicates that it is not adopted. So anything that is gray in here he says I don't adopt which is where the necessarily comes in.

These things he adopted. There's no gray shading in this Exhibit G. I guess, Your Honor, he could have -- I guess he could have copied exactly this Exhibit G and labeled it obviousness, but he told them, I'm asserting these

combinations. They are --

THE COURT: Ms. Stoll-DeBell, wait a minute. It is just axiomatic that anticipation and obvious are not the same things. I mean, they really aren't, and what makes something anticipated does not make it obvious, and if you want to explain that something is obvious, you have to explain why you think it's obvious.

He's explained fully why he think it's anticipated, but he hasn't -- he hasn't made an analysis other than to say because I say so, the same analysis applies to obviousness as I have said as to anticipation, so if it loses as to anticipation, it's nonetheless obvious.

He, therefore, obviously -- that's a bad word. He therefore, quite clearly, knows that there's a difference, but he hasn't explained the difference, and he can't be heard to say everything I said about anticipation applies with equal force to obviousness, because that's just not the calculus that the Federal Circuit requires, is it?

MS. STOLL-DeBELL: Well, okay, so for -- no, they are different theories, Your Honor, but they are related. Anticipation you need to show every claim element is tied in a single reference; right?

THE COURT: Yes.

MS. STOLL-DeBELL: And obviousness, you are combining more than one reference, but you still have to look and say,

well, where in that reference is this claim element taught, and in that way they are the same. You have extra things you have to do for obviousness because you are combining two references, and that extra stuff is the test set forth in the *Graham* case.

You have to talk about why would it be obvious for one of ordinary skill in the art to combine these two references, but obviousness inherently has anticipation in it because you have to look at that reference and say where does this disclose the preamble, where does this disclose the first element, where does this disclose the second element, and you do that for each of the obviousness references, and then you say, these extra things that is part of obviousness that is not part of anticipation, why would one of ordinary skill in the art combine them?

So they are different, but they are very related, and they are related in the sense that you need to go through and show where each claim element is disclosed, and that is what Exhibit 3 does, or Exhibit G. That's not the whole report, Your Honor. The whole report is the claim chart plus the body of his report.

THE COURT: As to J-CON plus Dworkin, that's in paragraph 230.

MS. STOLL-DeBELL: 231 through 235.

THE COURT: Well, 230 through 235.

MS. STOLL-DeBELL: 229 through 234.

THE COURT: 229 just says it anticipates.

MS. STOLL-DeBELL: I'm sorry. You're right. 230 through 234. So when you put all of those together, he's disclosed what he needs to disclose because he's got element by element here is where J-CON teaches this element, here's where it teaches this element. Here's where Dworkin teaches this element, here's where Dworkin teaches that element, and I would combine them because of the reasons he sets forth in paragraphs 232 through 234.

THE COURT: All right. Anything else, Mr. Robertson? It's your motion.

MR. ROBERTSON: Yes, Your Honor. There's just no reason articulation is required by the Supreme Court how you would combine these two and what elements from each you would draw upon for every individual claim element. You can't have an expert who just waves his hands up there and says, in my opinion, it would have been obvious.

That's inconsistent with the Federal Circuit case law and just inconsistent with Rules of Federal Civil Procedure and fairness. We were not put on proper notice, and if this is the sum total of his opinions, then all he did was wave his hands.

MS. STOLL-DeBELL: Your Honor, Mr. Hilliard responded. He rebutted these opinions, so they were put on fair notice. They had Dr. Shamos, they deposed him. I deposed Mr. Hilliard on this stuff. It has been part of this case.

They are on notice.

MR. ROBERTSON: Mr. Hilliard testified that Dr. Shamos's opinions on obviousness were conclusory. That was his testimony, and that is the truth.

MS. STOLL-DeBELL: Your Honor, I actually have a quote from Dr. Shamos's deposition --

THE COURT: Dr. Shamos or Dr. Hilliard?

MS. STOLL-DeBELL: Dr. Shamos. Ms. Albert asked him, and this is at page 237, line ten, of Dr. Shamos's deposition. Question: And then beginning at page -- well, at the bottom of page 67 through a portion of page 68, you set forth your opinions that the asserted claims are obvious based upon the combination of J-CON and Dworkin; correct? And Dr. Shamos says yes.

They were on notice he was asserting this combination, Your Honor, and to the extent, you know -- they certainly can always move for a directed verdict at the end of the day, but it's just not fair to look at this right now. He gave his report, he gave element by element citations to references that are stipulated, that are in evidence. He explained why he wants to combine them, and we ought to be able to put that evidence on to the jury.

THE COURT: Now, this is a motion to enforce previous orders. What previous order am I enforcing if I grant, if I strike this man's report -- if I keep him from testifying about

Exhibit 96, et cetera?

MR. ROBERTSON: Your Honor, both consistent with your order of November 19th which was excluding any opinions of counsel -- or excuse me, of experts that did not specifically reference and articulate reasons why the opinion is supported. Also consistent with Your Honor's earlier order with respect to Dr. Shamos's opinions being limited to only those things that were supported in his expert report and not outside of the second supplemental statement.

MS. STOLL-DeBELL: Your Honor, I completely disagree.

THE COURT: What orders are those?

MR. ROBERTSON: Your Honor, I'm looking at, I think it's document -- bear with me for a second. Document 516, theories not disclosed in the Court-ordered second supplemental invalidity statement which was docket entry number 492, and there was more than one order on Dr. Shamos and the second supplemental, and I am trying to identify and locate that right now, sir.

MS. STOLL-DeBELL: Your Honor, this J-CON plus Dworkin combination was in our second supplemental invalidity contentions, and it was not part of their previous motion on the second supplemental invalidity contentions or Dr. Shamos, because it was in our second supplemental invalidity statement.

We did go claim by claim and say why we believe that the combination of J-CON plus Dworkin and the combination of

J-CON plus P.O. Writer render these claims obvious, and we said why we think one of ordinary skill in the art would be motivated to combine them. That is absolutely in our second supplemental invalidity statement.

It has not been part of the briefing or motions or orders on any of that. And with regard to the order that you entered in December, that related to two other exhibits. It had nothing to do with Dr. Shamos. It was whether these exhibits, you were going to sustain their objection to them. Those exhibits are out. We understand that, but Dr. Shamos also cited to the exhibit that is in. So this is not a motion to enforce prior Court orders. It has never been raised to you before.

MR. ROBERTSON: Your Honor, this is Mr. Robertson again. Also document number 382 which was filed, an order filed by Your Honor on July 30th, and let me quote it for you. For the reasons set on in the record during the July 28, 2010, hearing, the plaintiff's motion in limine number two to enforce the Court's orders of May 24th and May 25, 2010, and exclude any expert opinion, other testimony, or argument pertaining to alleged prior art and invalidity theories not set forth in defendant's Court-ordered second supplemental statement is granted. That was July 30th.

These opinions that you see in Dr. Shamos's report are the only opinions that relate to J-CON and Dworkin, so it

doesn't matter that even in fact, and I will respectfully disagree with counsel's representation, that obviousness opinions were set forth in the interrogatory answers or the succeeded second supplemental, because they were not, and if anything, they were as conclusory as Dr. Shamos's, but Dr. Shamos needs to be limited to those reports, to those opinions that are supported by the evidence, and, clearly, the theories that he's articulating with respect to obviousness fall far short of that under the case law.

MS. STOLL-DeBELL: Your Honor, I'm looking at our second supplemental invalidity statements. At page 88, we have a whole section that's entitled the J-CON system in combination with the Dworkin patent, the '940 patent, render certain claims obvious, and it goes from page 88 -- I'm paging down to see where this even ends. Page 88 through page 104 is our disclosure in our second supplemental invalidity contentions that the combination of J-CON plus Dworkin render the claims obvious.

And then at page 104, we have another heading, the J-CON system in combination with the P.O. Writer system render claims obvious, and that goes from page 104 -- I'm paging through all these claim charts.

MR. ROBERTSON: But that wasn't in Dr. Shamos's report; isn't that right?

MS. STOLL-DeBELL: Mr. Robertson -- Your Honor, it

was in Dr. Shamos's report as I just said. This issue was not part of the prior orders which is what we have been discussing because it was properly disclosed in our second supplemental invalidity contentions.

Your Honor, we did disclose those two combinations based upon J-CON, based upon obviousness in our second supplemental invalidity contentions. We have over 30 pages of information on those two obviousness combinations.

Dr. Shamos disclosed it in his report. He talked about the motivation to combine, and he had it element by element citation to exhibits that are admitted for trial, and he ought to be able to get on the stand and give those opinions.

THE COURT: All right. I think I've heard enough. I don't like the way that you all have done your reports, but that's not what this issue is about. I don't think this relates to a previous motion to enforce -- I mean a previous Court order in any significant way because it is in the second supplemental.

His report, as verbose as it is, is almost ununderstandable to me. I'm sure you all have taken depositions on it and understand what he's saying or you would have been in here in another format. So I'm going to deny the motion as to the J-CON, Writer, and Dworkin and -- I mean J-CON combined with Dworkin and combined with P.O. Writer, because I

don't think it relates to a previous order. That's the end of it all, isn't it now?

MS. STOLL-DeBELL: Your Honor, there was one remaining issue, but I think I can resolve it without having Mr. Robertson speak. They had some complaints about Dr. Shamos's anticipation argument based upon P.O. Writer for three claims, and we will not assert those at trial, so that should resolve all the issues.

And so to make the record clear, we will not have Dr. Shamos testify about anticipation based upon P.O. Writer for claims three, 28, and 29 of the '683 patents.

THE COURT: Hold on. Say it again.

MS. STOLL-DeBELL: We will not have Dr. Shamos testify about anticipation based upon P.O. Writer for claims three, 28, and 29 of the '683 patent.

THE COURT: And that addresses which part about --

MS. STOLL-DeBELL: I believe that's the only remaining issue in plaintiff's motion, Your Honor.

THE COURT: But which issue is it?

MS. STOLL-DeBELL: It's the P.O. Writer issue.

MR. CARR: Judge, this is Dabney Carr. Kirstin, maybe you also want to make clear which anticipation of P.O. Writer claims that were not objected to.

MS. STOLL-DeBELL: Yes, there are still three remaining claims they didn't object to in their motion.

THE COURT: You are talking about number six of their motion.

MS. STOLL-DeBELL: Yes. I'm looking for their motion.

THE COURT: Precluding defendant from offering testimony or other evidence concerning its allegation that P.O. Writer prior art anticipates three, 28, and 29 of the '693 patent.

MS. STOLL-DeBELL: Yes, Your Honor. We will not assert that.

THE COURT: So that aspect of the motion is denied as moot.

MS. STOLL-DeBELL: Yes, Your Honor.

THE COURT: Okay. That takes care of everything, does it, ladies and gentlemen?

MS. STOLL-DeBELL: I just want to point out, as Mr. Carr said, Your Honor, we still do -- we still will assert P.O. Writer anticipation based upon three other claims.

THE COURT: What claims are they?

MS. STOLL-DeBELL: Claims 26 of the '683, and claims one and six of the '516.

THE COURT: Say again.

MS. STOLL-DeBELL: Claim one and six of the '516 patent and claim 26 of the '683 patent.

THE COURT: All right.

MS. STOLL-DeBELL: I think that takes care of that.

THE COURT: Are you all through with that, all that motion now, Mr. Robertson?

MR. ROBERTSON: One other issue, Your Honor, that's come up, but I know that the day is late and we've been on the phone for a long time, that deal with the fact that now that the Court excluded Defendant's Exhibits 121 and 122 that have to deal with P.O. Writer, there was significant deposition testimony by Ms. McEneny that is no longer corroborated by those documents as they are inadmissible. We've submitted that to the Court for consideration with the citations we believe now for deposition testimony should be --

THE COURT: Wait a minute. What motion is that?

MR. ROBERTSON: It's in -- I'm sorry. Let me identify it for you, Your Honor. It's at page 23 of our opening brief.

THE COURT: Is that one of the six things that's in the opinion -- I mean in the motion?

MR. ROBERTSON: I'm sorry, Your Honor. It may not be in the actual paper motion itself. It was briefed in there -- if it was not in the motion, it was done inadvertently.

MS. STOLL-DeBELL: Your Honor, I might be able to shorten this a little bit, too. I agree that there should not be deposition testimony from Ms. McEneny regarding the exhibits that were taken out, DX-21 and -- 121 and 122, and I think our

only point is to the extent that some of the testimony ePlus designated that relates to those exhibits should be out as well.

THE COURT: Of course it should.

MS. STOLL-DeBELL: They don't seem to want to agree to that, Your Honor.

THE COURT: Well, of course you're going to agree to that, aren't you?

MS. STOLL-DeBELL: I sent them a letter listing which segments of testimony I thought related to those exhibits and said, I'm going to pull out ours, Lawson's, but you need to pull out yours, too.

THE COURT: You need to pull them out, don't you, Mr. Robertson?

MR. ROBERTSON: I don't think we need to take your time with this. The answer is if it relates to that exhibit, I'll take it out. If there's an admission Ms. McEneny made about her system that it couldn't perform certain functionality, that's not going to be in those exhibits. The documents don't say what it can't do. What she was testifying is what it couldn't do. That was an admission.

THE COURT: Get it straight. You can't use the testimony if they can't. All right.

MS. STOLL-DeBELL: Your Honor, perhaps we could just deal with these issues on the call with Mr. Carr and Mr.

Merritt.

THE COURT: Get them straight and reduce it to an order.

MS. STOLL-DeBELL: Okay.

THE COURT: How many witnesses are you going to have, Mr. Robertson?

MR. ROBERTSON: Rough guess right now, Your Honor, live witnesses, I think eight live and I think three by depositions. We've been working -- or four, excuse me, by deposition. We've been working with counsel to try and limit as much as possible the number of -- the time for the depositions. At last count, I think for all the depositions it's under four hours. So that's where we stand on that, sir.

THE COURT: How about you, Mr. McDonald?

MR. McDONALD: We have, I believe, nine live witnesses and two depositions which I believe are both pretty short.

THE COURT: I'm going to tell you something. The way all these papers come in, you're going to have the jury totally confused before sundown the first day if you don't figure out a way to streamline the case and sort it out. They're never going to understand any of this stuff.

I may have to declare a mistrial if I feel like you all have bollixed everything up and made it impossible for the jury to understand, because you have an obligation to put on a

case that the jury can understand, and I can tell you from reading the gobbledygook that Shamos writes, about 40 minutes of him and those jurors are going to feel like somebody is trying to anesthetize them, and about five minutes after that, they're going to go on off to sleep, so you better get it straight.

I don't know, I haven't read many of these other reports recently, but I told you earlier that yours -- how long was your guy's report, Mr. Robertson? 180 pages or something?

MR. ROBERTSON: That's probably right, Your Honor, but obviously I don't want to put the jury to sleep, so we're going to try to keep them as entertained and alert as possible.

THE COURT: This is a hard case for a jury to understand, and you're going to have problems. We've agreed we're going to show the Federal Judicial Center CD at the beginning; right?

MR. McDONALD: That's correct, Your Honor.

MR. ROBERTSON: That's correct.

MR. McDONALD: We have the question that maybe Mr. Robertson would agree would be helpful. We appreciate getting the list of the jury pool. Is it possible that the Court could have the order of selection of the jurors picked perhaps on Monday and get that to us ahead of time? That might help us streamline the selection process.

THE COURT: What did you say?

MR. McDONALD: The order that you'll be calling them from the jury pool and putting them up into the seats, can you draw that order on Monday instead of Tuesday and get that to us?

THE COURT: They are drawn by lot the day of the hearing.

MR. McDONALD: And I'm just asking, and I understand if you don't want to do it, but it would be convenient, I think, for both parties if you drew it by lot on Monday instead of Tuesday and we knew ahead of time.

THE COURT: We don't even know who is going to show up. You're going to have nine jurors; right?

MR. McDONALD: That's our understanding. I think you mentioned that before.

THE COURT: I want you to have for the jurors a notebook, and the notebook will have in it the following things, so you'll need nine of them: You'll have each of the patents and highlighted the claim language, just the claim language so they can quickly see what is at issue, and put a tab on it.

MR. McDONALD: Your Honor, to clarify, would that be just the claims that are asserted?

THE COURT: Yes, the claims that are at issue. You put a little tag of some kind where the claims begin so that they can -- one of these little neon flags so that they can

quickly get to that part, and then just highlight them in the yellow highlight what the claims are. And then we've got the witness list; right?

THE LAW CLERK: Yes.

THE COURT: We've taken your witness list, and we've made a copy, and we're going to give that to the jurors. I want you to have in that notebook the claim construction for each term and then what the term means and have that labeled so they can get to it very readily.

And then I want you to have in that notebook -- this would be the first thing in it -- the patent that is used in the Federal Judicial Center tape so they can follow along with that very readily.

MR. ROBERTSON: Your Honor, this is Mr. Robertson. We've already prepared those notebooks exactly as you've described including a glossary of terms as you've construed it in the Markman ruling. I will send that over by email tonight to counsel for Lawson so they can assure themselves that it's faithful to your Court's ruling.

May I also suggest, we had included in the back some three-hole paged lined paper in case the jurors want to take notes, but I don't know what Your Honor's feeling is with respect to whether it permits or doesn't permit note-taking.

THE COURT: I let them take all the notes they want to, so go ahead and make your notes there. That's fine. Is

there anything else that you all think needs to be in the notebook for the jurors?

MR. ROBERTSON: That's fine from the plaintiff's perspective, Your Honor.

MR. McDONALD: I don't think Lawson has anything to add, Your Honor.

THE COURT: I've been through these exhibits, I mean these proposed instructions you want to give at the beginning, and I'm really not giving those kinds of instructions. I think this tape and the standard instructions that I give are going to be sufficient.

I do think it's appropriate when you all, if you order your case, for you to make a brief, just a statement to the jury that says, we're now offering evidence on infringement, and when your time comes, you can say, we're offering evidence of non-infringement, and then if you have new witnesses, we're offering evidence about the defense of invalidity or whatever.

I think some transitional statements are appropriate without any argument, just a little transition, to help the jury follow along. If you're going to do it with the same witness, now I'm going to turn to ask you some questions related to another of our defenses. Do you see what I'm talking about, gentlemen, ladies?

MR. McDONALD: Absolutely, Your Honor. Thank you for

giving us the chance to do that.

THE COURT: It will help them be oriented to what you are doing, and if you abuse that process, then I'll have to deal with it later.

How long do you estimate now your case is going to be, Mr. Robertson? You've, I'm sure, been honing it down. I've got to tell the jury what we're looking at.

MR. ROBERTSON: Yes, Your Honor. I've given that a lot of thought. The first day is going to be eaten up by a lot of jury selection, the Judge's preliminary instructions, the opening statement, the playing of the videotape. I'm hoping to get somebody on as fast as possible and get through at least a witness, if not two, that first day, but to be candid with Your Honor, I don't think that we're going to be able to rest our case by that Friday, because really that will only give us three full days since we're starting on Tuesday.

THE COURT: By the way, on January 10th, we're not going to have court.

MR. ROBERTSON: Also, Your Honor, I wanted to point out January 17th is Martin Luther King Day, so I assume we're not going to have court on that day as well.

THE COURT: Don't assume. I'm going to wait and see how we're going.

MR. ROBERTSON: If Your Honor has nothing further, I just have one housekeeping matter I wanted to raise that the

parties have been discussing, and that is in calling witnesses, I understood Your Honor to indicate before that the Court is inclined to fairly confine cross-examination to the scope of the direct examination.

THE COURT: That's correct.

MR. ROBERTSON: We are going to be calling some Lawson witnesses as adverse witnesses.

THE COURT: You have the right to do that.

MR. ROBERTSON: I'm sorry, sir?

THE COURT: You have the right to do that, and you can treat them --

MR. ROBERTSON: The suggestion has been made by Lawson that then they would want to address issues that they need to raise in their case in chief while that witness is on the stand --

THE COURT: No.

MR. ROBERTSON: -- and what I don't want to have happen, quite frankly, Your Honor --

THE COURT: Wait a minute, Mr. Robertson. We're not going to do that in this case.

MR. ROBERTSON: Thank you, sir.

THE COURT: They are going to come back and address their own people in their own case. It's hard enough for a jury to follow these cases without having control over them, and I found in the past that calling witnesses out of order

except when there's an emergency of some kind has created problems, and allowing one party to call the other party's witness during its case such as when you are calling a Lawson witness and then Lawson using its time to put on part of its case is confusing to the jury, and I think it's best in complicated cases, not just patent cases but all complicated cases, to follow a more structured approach.

MR. SCHULTZ: Your Honor, this is Mr. Schultz. May I comment on the inventors and also one of Lawson's witnesses, please?

THE COURT: What?

MR. SCHULTZ: The parties have also talked about the inventors, and the inventors will be going in in ePlus's case in chief. We have agreed with ePlus to exhaust those inventors when they first take the stand based on the fact that both parties believe that the topic areas that will be covered will be very consistent with what ePlus is going to be calling those witnesses. Is that okay with Your Honor?

THE COURT: I don't know what you mean.

MR. SCHULTZ: May we exhaust the inventors when they first take the stand with the topics that we desire, that Lawson desires to question them on? Mr. Robertson, maybe you can comment on that issue as well. I know I've dealt with Mr. Strapp before on this issue.

MR. ROBERTSON: I think I will be raising issues that

you want to address, Mr. Schultz, in direct, so I think it will be fairly within the scope of the direct for cross-examination. I can't imagine that it won't be with respect to those inventors.

MR. SCHULTZ: The reason I bring this up, Your Honor, is Lawson does not want to be precluded from asking any questions that may go outside of the scope of direct examination of the inventor. Otherwise, we want to have those inventors be able to come back in our case in chief.

THE COURT: They can come back in your case in chief.

MR. SCHULTZ: Your Honor, the other issue that I have is --

THE COURT: I would like to have -- just so you understand gentlemen, lady, each case is a discrete presentation. This is a case that may actually, in part, get resolved on directed verdict, and I can't decide that -- I don't want to decide that in the hodgepodge of the melding of testimony.

If I have to remember, when considering the obviousness, Rule 50 motion that's coming what was said back in the beginning, I think that's going to be difficult to keep in mind and to keep sorted out, and I just want to keep it in order.

MR. SCHULTZ: Your Honor, the other issue we had is one of our witnesses will be available the first week of trial.

That is Hannah Raleigh. ePlus has Hannah on their witness list. Ms. Raleigh will be in Mumbai starting the 11th of January. We would ask the Court for the exception to exhaust that witness when she takes the stand.

THE COURT: Who is Ms. Raleigh?

MR. SCHULTZ: Ms. Raleigh is one of Lawson's employees.

THE COURT: Why is she going to Mumbai?

MR. SCHULTZ: Part of her job.

THE COURT: Well, again -- what's the nature of her testimony? I don't like doing that.

MR. SCHULTZ: And I don't know what ePlus plans on calling her for.

THE COURT: What do you want her for?

MR. SCHULTZ: We actually don't need her for much. Essentially to rebut what ePlus does.

THE COURT: Well, you ought to be able to do that by cross-examination, because if they ask a topic and you want to respond to what they ask, you ought to be able to ask that on cross-examination, shouldn't you?

MR. SCHULTZ: Yes, Your Honor. I just wanted to raise the issue for the Court's understanding of Ms. Raleigh.

THE COURT: Ms. Raleigh may be making several trips. Again, I don't want -- I don't want this case split up. If somebody has an emergency and we can't help it, then that

happens, but this is something you all can plan for.

Uh-oh. Are you all there? They're gone.

(Brief interruption.)

THE COURT: Hello.

MR. MERRITT: Judge.

THE COURT: All right. Is everybody here assembled? I don't know what happened.

MR. MERRITT: Judge, this is Craig Merritt. I'll take responsibility. I bumped a button on my phone, and since this phone is the lynchpin of the whole call, everybody dropped off. I apologize.

THE COURT: The last we were talking about was Hannah Raleigh, and I said she might have to make a trip back, and I'd like to follow the fairly strict approach to things, I think, is where we were. Anything else that you all need to deal with?

MR. MERRITT: Judge, the only thing I can think of is for those who haven't tried a case with you, juror voir dire is not an opportunity for people to get warm and fuzzy with the jurors, and I assume that you'll be holding that pretty tightly based on the questions we've submitted.

THE COURT: Yes, I'll be conducting the examination myself as usual in this district, and I don't anticipate that it's going to take very long to pick this jury and that the videotape -- I mean the DVD from the Judicial Center is about

20 minutes. How long do you anticipate opening statements to be?

MR. ROBERTSON: Your Honor, this is Mr. Robertson. Certainly going to be less than an hour. I'm going to be shooting for 40 to 45 minutes.

THE COURT: How about you, Mr. McDonald?

MR. McDONALD: 45 minutes was my target, Your Honor. I'll try to match Mr. Robertson.

THE COURT: All right. So we ought to be able to start -- we'll start at 9:30 and take the jury -- I expect by 11:00 we'll have a jury at the latest. Is ePlus, is it a publicly traded company?

MR. ROBERTSON: Yes, sir.

THE COURT: And Lawson is or is not?

MR. McDONALD: Lawson is, Your Honor.

THE COURT: So we'll have -- all right. On the voir dire examination, do you all have -- you all have submitted questions. Have you looked at each other's questions? Have you looked at the proposed questions?

MR. ROBERTSON: Your Honor, I personally have not, but one of my members of my team has, and I guess if you have questions about it, he can address that.

THE COURT: Are there any objections to the other side's questions?

MR. YOUNG: Your Honor, this is David Young for

ePlus. We do not have any objections to the proposed voir dire.

MS. HUGHEY: Yes, Your Honor, this is Rachel Hughey for Lawson. The instructions were similar. The parties' structure was a little bit different.

MR. McDONALD: We don't have any objections?

MS. HUGHEY: No.

MR. McDONALD: No objections from Lawson, Your Honor, to theirs, to ePlus's.

THE COURT: All right. Okay. Is there anything else that we have pending now that we need to deal with?

MR. McDONALD: Was a there a question or two about a couple of exhibits? I think there is a couple, isn't there?

MS. STOLL-DeBELL: We have some possible disputed issues regarding some exhibits, Your Honor, that we -- I don't know. We may be able to reach a resolution on them. From our perspective, I think there are two exhibits on ePlus's exhibit list that we think should be off. One of them is a duplicate exhibit of one that you sustained our objections to.

Basically they are Lawson's annual reports, and they were part of the group of financial documents that you heard argument on at the pretrial, and we objected saying they were not relevant, no longer part of the case. ePlus said they were relevant to secondary considerations, and you disagreed and sustained their objection. So we'd ask ePlus to take them off

the list.

MR. STRAPP: Your Honor, this is Michael Strapp for ePlus. We haven't yet -- we've heard an objection. We haven't heard the rationale for the objection, nor have we had a chance yet to meet and confer regarding those exhibits, and we will do so.

We've also raised similarly a few issues with respect to Lawson's final trial exhibit list including two exhibits concerning P.O. Writer that have been already, we believe, been excluded by Your Honor.

MS. STOLL-DeBELL: Michael, I agree, they have.

MR. STRAPP: As well as a category of exhibits reserved for Mr. Knuth which have never yet been identified which we believe are improper as well.

MS. STOLL-DeBELL: I think the Knuth thing, I would propose we address that during the meet-and-confer call that we're going to have regarding Mr. Knuth.

MR. ROBERTSON: We don't need to take the Court's time on this. We should just resolve these issues, shouldn't we?

MS. STOLL-DeBELL: I agree.

THE COURT: Anything else? All right. That's it. Thank you all very much.

(End of proceedings.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
P. E. Peterson, RPR

Date